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MISSISSIPPI DECISIONS

CONTAINING THE

UNREPORTED OPINIONS

OF THE

SUPREME COURT OF MISSISSIPPI

COMPILED BY

WM. HEMINGWAY AND C. M. McDONALD

VOLUME I.

JACKSON, MISS.
THE SOUTHERN LAW BOOK CO.
1906

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PREFACE.

This series of Reports contain all the unreported opinions of the Supreme Court of Mississippi from the earliest time down to 1885 a period covered by the Mississippi Reports from Walker's Report to volume 65. We publish no case heretofore in print. Thinking it might be of some convenience, we have included as foot notes to each case a *Digest Annotation,* the work of Hon. Wm. Hemingway, and in the General Digest to the full series, these cases will be referred to under elaborate Cross-References.

Hoping that our joint labors herein may prove of some value to the Bench and Bar, we commend the work to their favor and indulgence.

CHARLES M. McDONALD.
WILLIAM HEMINGWAY.

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MISSISSIPPI DECISIONS

CONTAINING THE

UNREPORTED OPINIONS OF THE SUPREME COURT.

J. S. Walker *v.* Georgia Pacific Railroad Company.

Eminent Domain Proceedings.—Right of Railroad to Institute.

The pendency of a suit in equity by a landowner against a railroad company for having wrongfully constructed its roadbed on his land does not bar eminent domain proceedings by the Railroad Company to condemn the land for a right of way.[1]

Same—Termination of Suit by Condemnation Proceedings—Collateral Attack.

A regular eminent domain proceeding by a Railroad Company condemning lands for a right of way and fixing the sum to be paid therefor terminates a previous suit begun by the landowner for damages resulting from the wrongful entry by the Railroad Company, and where the proceedings are regular on its face it cannot be attacked collaterally.[2]

The Georgia Pacific Railroad Company entered upon lands belonging to J. S. Walker and constructed its roadbed thereon. Walker filed the bill in this case in the Chancery Court of Washington county, where the land was situated, against the railroad company praying for the appointment of a commissioner to take an accounting of the damages suffered by complainant by reason

---

1

Authority in the charter of a railroad company to institute eminent domain proceedings does not deprive the landowner of the right of action in ejectment or by any other appropriate remedy to recover possession, if the company entered upon and occupied the land without obtaining a right of way. Beck *v.* Railroad Co., 65 Miss. 172.

2

Where a railroad company enters upon land without acquiring the right of way, though a trespasser and liable as such, it still has a right to acquire a right of way by condemnation. Railroad Co. *v.* Dickson, 63 Miss. 380.

If the charter requires that landowners shall be compensated at the time their property was taken, and the company has used the lands for

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of the alleged wrongful taking of the land and for the use and occupation of same and for a decree against defendant for the amount found to be due by the commissioner and for an injunction restraining defendant from further occupying and using the land.

The defendant company answered the bill, but before final hearing it instituted eminent domain proceedings for the condemnation of the lands for use as a right of way and procured a judgment for its condemnation, fixing the amount of damages. It then filed an amended bill setting up this fact and paid the amount of damages assessed by the jury to the circuit clerk and tendered same to complainant in the amended bill. Complainant filed exceptions to the amended answer.

From a final decree, adjuring the eminent domain proceedings to have been regular and according to law and that the amount of the damages had been properly tendered and that the eminent domain proceedings vested title to the right of way in defendant, complainant appeals.

APPEALED from Chancery Court, Washington county, W. G. PHELPS, Chancellor.

Affirmed, April 27, 1885.

Attorneys for appellant, W. H. Trigg, F. Johnston.

Attorney for appellee, W. A. Percy.

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seven or eight years without procuring the right of way, on the petition of the owner for an appraisement of his damages under the charter, the company is not entitled to have the damages estimated as of the time of the original taking. Railroad Co. *v.* Hopson, 73 Miss. 773.

Neither party in an eminent domain proceeding is in any way affected by the fact that the owner had previously recovered of the company in an action of trespass damages for having entered on the land and built and operated its road. Hopson *v.* Railroad Co., 71 Miss. 503.

Offer to show that an alleged verdict in proceedings to appropriate land for the right of way of a railroad was no verdict, but the certificate of unauthorized individuals, is not a collateral attack on the verdict. West *v.* Railroad Co., 61 Miss. 536.

A proceeding to take private property for public use is not a "matter," "case," or "cause" as employed in the Constitution of 1869, fixing the jurisdiction of the courts it created. Railroad Co. *v.* Drake, 60 Miss. 621.

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Brief of W. H. Trigg:

The possession of land acquired for railway purposes, in order to be legal, must be obtained by strict compliance with the right of acquisition, either by purchase or condemnation granted to them by the terms of their charter and any variance therefrom will to that extent constitute such railroad company a trespasser. 2 Kent, 299; 2 Cranch, 167.

It has no power but such as has been granted in clear and specific terms. 1 Black, 446; 37 Miss. 702; 60 Miss. 702–705.

A law which does not provide for compensation is void, but if not void, it is inoperative to pass title till compensation is made. Mills, Eminent Domain, § 124; Bonaparte *v.* Camden R. Co., Baldwin, 205.

It is the duty of the corporation to condemn, and a failure so to do makes it a trespasser, and any act of the Legislature negativing the duty of payments before entry would be unconstitutional and void. 60 Miss. 568; Pierce, Railroads, pp. 165 *et seq.;* Mills, Eminent Domain, § 332.

It is not cured by future condemnation and the defendant is still a trespasser. *Ibid.;* 51 Mo. 136; 102 Mass. 512; Mills, Eminent Domain, §§ 89, 90; 118 Mass. 138; 5 Wall. 413; 84 Ill. 135.

Mere acquiescence of owner no waiver of rights. Mills, Eminent Domain, § 143 *et seq.*

Inasmuch, then, as the land in the hands of O. M. Blanton was subject to the payment of the trust debt, its purchase by appellee, or its vendee, did not relieve it from liability. Neither would the consent or agreement of Bolton as agent avail the appellee. 37 Miss. 558.

The appellant was, even if the defendant at this late date could go in and condemn under its charter privilege, entitled not only to the value of the land taken, but also to recover the value of the roadbed, rails, and cross-ties. 60 Miss. 702.

Even the conveyance of O. M. Blanton will not be sufficient to relieve the appellee from the effects of the illegal entry.

The trustee and *cestui que trust* in the deed of trust executed by O. M. Blanton to O. Hea, trustee, were entitled to notice of entry, and the railroad company was bound by the recorded deed of trust to take notice of the fact that this title was outstanding. Mills, Eminent Domain, §§ 74, 75.

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It is charged that before the institution of this suit that complainant requested the railway company to have a jury summoned to assess his damages, sustained by reason of the occupation of a portion of his land as a roadbed. This request was by the defendant refused.

This statement in complainant's bill is nowhere denied. This, we think, if not before, placed the railroad in the shoes of O. M. Blanton, the mortgagor, entitled to no privilege at the hands of the complainant which Blanton could not claim.

As to the character of the decree that should have been rendered, we cite 61 Miss. 481; Code, 1880, § 1415.

Again, the return of the verdict of the jury shows that in the rendition of their verdict they did not take into consideration the value of the land taken in lot 4 of section 11, it being a part of the land mentioned in the bill, and occupied by appellees.

Brief of F. Johnston:

The propositions that I shall present are as follows:

1. The condemnation proceedings cannot defeat the jurisdiction of the Chancery Court in this cause, because, first, the condemnation proceedings are void, and, secondly, no tender of the amount of the verdict was ever tendered. And thirdly, part of the right of way in lot 4 was not included in the condemnation proceedings.

It is beyond controversy now that Walker is, in respect to this land, the owner of the legal title, as mortgagee and purchaser at the foreclosure sale.

The acts of the Legislature respecting this railroad company are: Act of July 21, 1870, p. 277; act of 1872, p. 247; act of 1882, pp. 828, 829. All these acts in taking *in invitum* required *notice* to the owner, and *tender* to the owner of the compensation.

The writ was taken out on the 8th day of October. It fixed no day for the assembling of the jury. The sheriff at once fixed the 14th of October, and executed the writ as to J. S. Walker, by posting it on the land, stating that Walker was not "within" the county, and had no dwelling-house. Dr. Walker, as shown by the proof (his affidavit), not objected to, was a citizen of the county, with a fixed place of abode. He had not been out of the county for a great while, until October 8, 1884, he left the county on business, returning on the 16th of that month. Both

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the defendant and the sheriff knew that he was a citizen of the county and that he had a place of abode in the county. I deny that this posting of the notice on a tree or fence, on the state of facts disclosed, can make this *ex parte* proceeding binding or legal.

All the authorities agree that the class of statutes must be strictly construed *and strictly followed* to confer this right of entry on the railroad company. 118 Mass. 138; 5 Wall. 413; 84 Ill. 135; Mills, Eminent Domain, 591.

No tender of the money was ever made.

It is a tender or payment that gives the right to enter or the right to easement. Williams *v.* New Orleans R. Co., 60 Miss. 706; Cameron *v.* Supervisors, 47 Miss. 264; Paris *v.* Mason, 37 Tex. 447; Floyd *v.* Turner, 23 Tex. 292; Pierpont *v.* Stainsville, 9 W. Va. 215; Mettler *v.* Easton R. Co., 25 N. J. Eq. —.

Especially when the company is solvent. Turnpike Co. *v.* Burket, 26 Ind. 5.

And the pending of proceedings to condemn will be no defense to the action of ejectment. Coburn *v.* Lumber Co., 46 Cal. 31.

Payment or tender indispensable. New Orleans R. Co. *v.* Lagarde, 10 La. Ann. 150; Gillan *v.* Hutchinson, 16 Cal. 153.

The answer attempted to this requirement was, that the money was paid to the circuit clerk. But this will not do. Clearly nothing but a statutory requirement could justify this.

If he is unknown, then only could the money be paid to the clerk. But he was not unknown to the defendant, but well known to the railroad company, and its solicitors. He was, and is, their adversary in this particular cause. It was his distinct and absolute right to have this money tendered to him.

Where the statutory method is not strictly followed, no easement is obtained, and there is no defense to the usual actions or legal remedies in the court for relief. Mills, Eminent Domain, § 91; Blaisdell *v.* Winthrop, 118 Mass. 138; Ewing *v.* St. Louis, 5 Wall. 413; Railroad Co. *v.* Schertz, 84 Ill. 135.

The court may order and direct compensation to be made, or enjoin the use of the property. Davis *v.* Lacrosse R. Co., 12 Wis. 16.

Brief of W. A. Percy.

Where judgment has been recovered in ejectment against a railroad company, for land occupied by its track, an injunction

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against the execution of the judgment will lie until the company can have the damages assessed to acquire lawful possession under its power of eminent domain. Pittsburg & L. E. R. Co. *v.* Brown, Am. & Eng. R. Cas., vol. 10, p. 1.

The sole question in this case, as now presented to the court, is whether, pending a litigation with regard to its right of way, a railroad company may admit plaintiff's right to resort to a condemnation. * * *

The condemnation proceedings were strictly regular, exactly in accordance with the statute. Acts 1882, p. 828. The sheriff's return shows that plaintiff was not to be found, and that he posted notice for the time required at a conspicuous place on the land. It is well-settled law in this State that unless notice is required by statute, none need be given in this proceeding. Stewart *v.* Board of Police, 25 Miss. 479; New Orleans R. Co. *v.* Hemphill, 35 Miss. 17.

The award of the jury of inquest does not show whether the value of the cross-ties and rails was included in its estimate or not. Presumably all proper element of damages was considered, and where the statute appears on the face of the proceedings to have been strictly conformed to it cannot be collaterally impeached. Pierce, Railroads, 189.

If the jury of inquest refused to consider the value of defendant's superstructure in making the award, or to allow damage for the same, the proper plan to test the rightfulness of its action in this particular was to appeal as provided by the statute, and to assign this as one of the grounds of appeal. In point of fact, this has been done, and that appeal is now pending in the Circuit Court. * * *

The railroad company was not a trespasser *ab initio*. It went in and built its superstructure by virtue of the deed from Blanton, the mortgagor, then in possession. It has the right to remove it at any time, and because its title proves defective, the landowner cannot compel it now to buy in its own property. 42 Miss. 555; Pain, Railroads, 213. * * *

The Supreme Court of Michigan uses this language: "The railroad company, whether rightfully or wrongfully, laid this track while in possession for purposes entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used and to a railway track laid on it, the tech-

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nical views which apply in some other cases to structures inseparably attached to the freehold." "And in a proceeding to obtain a legal and permanent right to occupy the land for this very purpose, there would be no sense in compelling them to buy their own property." Am. & Eng. R. Cas., vol. 5, p. 386.

In this case cited, the point was directly in issue upon an appeal from a jury awarding damages. See also Am. & Eng. R. Cas., vol. 17, p. 78 — a strong case.

OPINION.— CAMPBELL, J.:

The pending of the suit in chancery was no obstacle to the institution of proceedings in pursuance of the charter of the appellee for the condemnation of the right of way. This proceeding seems to have been in strict accordance with the charter, and its effect was to vest the right of way in the appellee, and mutually to put an end to the controversy involved in this suit. The amount of compensation awarded by the jury in the proceedings to condemn the right of way was deposited with the clerk, and also was offered to the appellant by the appellee in its answer. The appellant could have called for and obtained the money thus tendered, and cannot object that the compensation awarded was not made.

Whether the sum awarded was enough, and what were the elements of the estimate of damages by the jury, is not before us. That is involved in any appeal which may have been taken from the finding of the jury as provided by the charter. All that we decide is that the proceeding for condemnation appears on the face of the papers to have been according to law, and that the legal effect was to put an end to the controversy between the parties to the suit, and that the Chancellor properly disposed of the case. The declaration of the decree as to the nonliability of the appellee, for the value of the cross-ties and rails, whether correct or not, is not properly in the decree, and is not, therefore, *res judicata*. We express no opinion upon that question. If an appeal was taken from the finding of the jury, all questions pertaining to the inquest of damages properly arise in that appeal.

Affirmed April 27, 1885.

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JOHN A. COVINGTON *v.* JOS. W. PATRICK.

Assignment for Creditors — Injunction — Estoppel.

A creditor of an insolvent banking corporation, who is present at a meeting of its creditors when an assignment is resolved upon and expresses no dissent, cannot disaffirm an assignment made in pursuance of the agreement after a trustee has been appointed who took charge of the assets and sells same to innocent purchaser for value, and he will be enjoined from levying execution on land sold by said trustee and selling same.[1]

Same — Unopposed Sale.

The unopposed sale of the effects by the trustee passes the legal and equitable title to the purchaser and he holds it free from danger of a disaffirmance thereafter.

The Rankin County Savings Institution, a banking corporation, became insolvent. There was a meeting of its creditors held and a resolution was adopted directing that an assignment of its assets be made for the benefit of the creditors. Appellant, Covington, was present at this meeting. In pursuance of this resolution an assignment was afterward made and a trustee was appointed who took charge of the assets, real and personal, gove notice to creditors as required by the assignment, sold the property, and made distribution of the proceeds except the *pro rata* share

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1 The assignment as written is the law for the administration of the insolvent's estate, and it must be susceptible of complete execution without depriving creditors of their legal rights. Richardson *v.* Stapleton, 60 Miss. 97; Marks *v.* Bradley, 69 Miss. 1; Selleck *v.* Pollock, 69 Miss. 870; Hiller *v.* Ellis, 72 Miss. 701.

If there is an immediate necessity for the execution of an assignment for the benefit of its creditors by a corporation, and it does execute such an instrument, through a legal quorum of its directors, authorized to do so by the stockholders, given at a meeting where a majority of the stock and stockholders were represented, the assignment is not void or voidable at the suit of creditors, none of the stockholders objecting thereto because proper notice was not given of the meetings. Bank *v.* Bank, 83 Miss. 610.

An assignee of property under a general voluntary assignment for the benefit of creditors is not a *bona fide* purchaser. Hence, a landlord may attach for rent goods assigned by his tenant, if they would be liable notwithstanding the assignment, the right to attach existing against every one,

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of appellant who refused to accept same. Appellant brought suit on his claim against the bank and obtained a judgment. Some of the land that had belonged to the bank was sold by the trustee to appellee, Patrick. Appellant had execution issued on his judgment and caused same to be levied on the land sold to Patrick and it had been advertised for sale under the execution. Appellee then filed the bill in this case in the Chancery Court of Rankin county where the land was situated praying for a writ of injunction to restrain Covington and the sheriff from selling the land under the execution and a writ of injunction was issued. Appellant answered the bill and made a motion to dissolve the injunction. The motion was heard on bill, answer, and affidavits. Appellant admitted being present at the meeting in which it was decided to make an assignment but stated that he took no part in it and really disapproved that action, but did not express his disapproval.

From a decree overruling the motion to dissolve the injunction and making it perpetual this appeal is taken by Covington.

APPEALED from Chancery Court of Rankin County, T. B. GRAHAM, Chancellor.

Affirmed, May 18, 1885.

Attorneys for appellant, Miller & Conn, and Joe Purser.

Attorney for appellee, Wm. Buchanan.

except a purchaser in good faith and for value. Paine *v.* Hotel Co., 60 Miss. 360; Paine *v.* Sykes, 72 Miss. 351.

Estoppel *in pais* only arises when manifest justice and equity as respects the right of another requires its application. Madden *v.* Railway Co., 66 Miss. 258.

Estoppel operates only in favor of one who, induced by the acts or representations of another, so changes the situation that injury would result if the truth were known. Hart *v.* Foundry & M. Co., 72 Miss. 809.

The principle on which the doctrine of estoppel rests is that it would be a fraud for one to assert what his previous conduct has denied, when on the faith of that denial others have acted. Staton *v.* Bryant, 51 Miss. 261; Davis *v.* Bowmar, 55 Miss. 671. See also Covington *v.* Myers, 62 Miss. 730.

An assignment fraudulent as to creditors can be set aside only by a creditor, and if all the creditors assent, it is good; and so a nonassenting creditor cannot object, if the trustee in the assignment offer to pay him. Whitney *v.* Freeland, 4 C. 481.

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Brief of Miller & Conn:

This case involves all the facts and questions of law except the deed from J. M. Jayne, cashier, that are contained in the case No. 4878, Covington *v.* A. G. Mayers. In that case, complainant claims title by reason of a deed from J. M. Jayne, cashier, made subsequent to the assignment. But in this case there is no deed from Jayne to the cashier.

We refer the court to our brief in that case as our argument in this.

Brief of Wm. Buchanan:

Appellant is estopped by this conduct to question the validity of the sales made by the trustees under the assignment. Bigelow on Estoppel (2d ed.), p. 452, and authorities there cited; *Ibid.*, p. 459, n. 1; *Ibid.*, p. 487, n. 1; 2 Perry on Trusts, § 870, pp. 147, 148; 4 Kent Com. (11 ed.) top p. 282, n. 1.

If appellant has any interest now he had the same interest in the lands at the time they were sold by the trustee, and that was to have his claim paid out of the property of the bank. He could have proceeded by attachment, or could have enjoined the trustee, and in either case, the innocent purchaser here involved would have had notice of his repudiation of the assignment, and would not have made the purchases. * * *

Appellant was present when the assignment was recommended by the creditors, and expressed no dissent. * * *

He cannot now be permitted to deny the title of the purchases from the trustee on the ground that the trustee sold the lands without power. 2 Perry on Trusts, pp. 147, 148.

The assignment having been accepted by a majority of the creditors who were parties to it, the acceptance of appellant was not necessary to its validity, and in view of his conduct, third parties were justified in buying from the trustee, with the belief that they would get a good title, and he cannot avoid the effect of his conduct by showing that he had notified the trustees that he would not accept a benefit under the assignments, as this would not indicate that he objected to the assignment, because of its invalidity.

OPINION. — CAMPBELL, J.:

The appellant was present at the meeting of the creditors when an assignment by their debtor was resolved on; the assignment

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was made in pursuance of the resolution mentioned; the trustee appointed took possession and control of the property, real and personal, assigned and acted upon the assignment, gave notice to the creditors, collected money, sold property at private and public sales, received payment, and made conveyances; made distribution among creditors, and wound up the business committed to him, except that he has in hand the *pro rata* to which the appellant is entitled but refuses to receive, and it is now too late for the appellant, for the first time, to assail the assignment, and disaffirm it as to purchaser from the trustee, who bought for value in the belief justly created by the circumstances that the trustee had the right to sell.

The unopposed sale passed title free from the danger of a subsequent disaffirmance. Okie *v.* Kelly, 12 Pa. St. 323.

Affirmed.

MARY D. STRONG et al *v.* VIRGIL M. CANNON.

Wills — Construction of Powers in, Conferred on Trustee.

In construing the powers of a trustee, conferred in a will, the general purpose or scheme of the testator must be looked to; and where the trustee is vested "with full discretionary power" with respect to the trust and the fund is given him "to control, administer, and manage and to make such investments and disposition of it as he may deem best" and to appropriate the proceeds of same to certain beneficiaries named in the will, the power of the trustee is limited, and he is bound to have regard to the purposes of the trust and to act in accordance therewith.[1]

Same — Final Account and Discharge of Trustee.

A decree of the Chancery Court allowing a final account and discharging a trustee under a will is erroneous when the final account fails to show, with certainty, what the trustee received under the will, when he received it, and how he disposed of it.[2]

1

The great rule for the interpretation of a will is that the intention of the testator must be ascertained from the language employed and must be carried into effect, if not inconsistent with the rules of law, and the words are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the will. Where there is no ambiguity in the words there is no room for construction. Vannerson *v.* Culbertson, 10 S. & M. 150.

The words are to be construed in their plain and natural sense, unless a

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Statement of the Case.

J. R. Mosely died in 1876, testate, leaving a considerable estate. He named appellee, V. M. Cannon, and Robt. Day, his son-in-law, trustees to execute his will but conferring upon them distinct and separate powers and providing that one should not be held liable for the acts of the other.

The will in so far as it is material to this case is as follows:

"I give and bequeath to said Cannon, in trust, all my cash, cash assets, notes, accounts, mortgages and other claims and choses in action, to control, administer and manage the same and make such investments and disposition thereof as he may deem best and to appropriate the revenue, interest, proceeds and profits of the same to the use and benefit of Ann Eliza Harris, and the heirs of her body forever and to the children of my deceased daughter Josephine Day and the heirs of their bodies forever; one half to the said Ann Eliza, and the heirs of her body and one half to the

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different intention be manifested by the context. Tucker *v.* Stites, 39 Miss. 196.

It is always safest, in the interpretation of wills, to adhere to the words of the instrument, without considering either the circumstances arising *aliunde* or calculations that may be made as to the amount of property, or the consequences which may flow from any particular construction. Curry *v.* Murphy, 35 Miss. 473.

Yet a literal construction is not to be indulged in, which would defeat an intention appearing from the whole will; but we must consider all its parts, and the circumstances under which it was made, as shown on its face, and thereby ascertain the intention of the testator. Haughton *v.* Brandon, 40 Miss. 729.

The intention is the main object. In the construction of wills the main object is to ascertain the intention of the testator; the intention is to be gathered from the whole will, and, if legal, is to be carried out, notwithstanding it may violate technical rules which relate to the construction of words rather than the nature of the estate. Sorsby *v.* Vance, 36 Miss. 564.

In the construction of a will every part and provision must be made, if possible, to harmonize, and be consistent with the other parts; a construction will not, therefore, be put upon a clause of doubtful import, which would make it irreconcilably inconsistent with another plain and clear provision of the will. Dean *v.* Nunnally, 36 Miss. 358.

Technical rules of law, and the authority of adjudged cases, are not to be disregarded in the construction of wills; yet the true interpretation of a will is so dependent upon the language and circumstances of each particular instrument that adjudged cases are of less authority and are more hazardous in their application to the construction of wills than in any other branch of the law. Sorsby *v.* Vance, 36 Miss. 564.

Adjudicated cases can give but little aid in the exposition of a will, unless the words in the adjudicated case relied on, and the words in the will under

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children of said Josephine Day, deceased, and the heirs of their body forever."

"And I hereby invest said Robt. Day and V. M. Cannon with full discretionary power in executing their respective trusts aforesaid."

Cannon accepted the trust and administered same for several years. He filed his final account and in his petition asked to be finally discharged from his office as trustee. Appellants, children of Josephine Day, daughter of testator, and Robt. Day, appeared and filed exceptions to the account. The account does not show, definitely, how much Cannon received under the will. It shows receipts for considerable sums by Robt. Day, the father of appellants, which they claim should not have been paid to him, and a receipt from R. C. Shepher for $3,337 "in payment of an indebtedness due me by Josephine and Robt. Day secured by deed

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consideration, be the same precisely, and are used in the same connection. Vannerson v. Culbertson, 10 S. & M. 150.

To discover the intent of testator the court looks to the whole of a will. Tatum v. McClelland, 50 Miss. 1.

If apparent from the other parts of a will that a word was improperly used, it may be rejected, but it will not be rejected on a conjecture that the testator intended a provision similar to that in the statute regulating descent and distribution. Caldwell v. Willis, 57 Miss. 555.

Where the general purpose of the testator may be gathered from the whole will, an inconsistent clause referring to administration will be disregarded. Leigh v. Harrison, 69 Miss. 923.

The court will look at all the circumstances which surrounded the testator. Apparent inconsistencies in several parts of a will will be disregarded if there can be clearly discerned a general intent that should prevail and override the particular, although the latter be first expressed. The intent must control if it can be made compatible with the language used. Watson v. Blackwood, 50 Miss. 15.

See also Whitfield et al. v. Thompson et al., 85 Miss. 749; Gordon v. McDougal, 84 Miss. 715.

2

On a final accounting it will be presumed that one who was shown to be at one time an administrator continued in that capacity until the debts had been paid and the assets collected. Barr v. Sullivan, 75 Miss. 536.

An agent or trustee must conduct the business of his trust with fidelity, and follow the line of duty prescribed. Pressly v. Ellis, 48 Miss. 574.

Fiduciaries are responsible if they exceed their authority, although no bad faith may prompt their acts, and those who deal with them must take notice of the limitation of their power. Vernon v. Tippah County, 47 Miss. 181.

See also § 1950, Code of 1892.

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of trust on the Thomas place belonging to said Josephine Day." From a decree allowing the account and discharging the trustee this appeal was taken by the children of Josephine Day.

APPEALED from Chancery Court, Yazoo county.

Reversed and remanded, April 27, 1885.

Attorneys for appellant, J. C. Prewett.

Attorneys for appellee, Hudson, Hudson & Holt.

Brief of J. C. Prewett:

There is a single question involved — the proper construction of the will of Joseph R. Mosely, deceased — and on that depends the correctness of the decree of the Chancery Court. * * *

Each of the trustees, under the will, was made independent, the one of the other, and it was provided that "neither of them be responsible for the acts of the other," and that "neither of them shall be required to give security for the proper execution of their respective trusts." Does this language indicate that the trustees were to be emancipated from all control of law and reason and justice?

Or does it mean that the "discretion" given by the will was a sound legal discretion?

"Discretion" has been defined as "a man's own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind." Thus, a trustee has a discretion, often, as in this case, in the management or application of the trust property. So, a judge or court often has a discretion in making orders, or imposing conditions on litigants. Discretion, however, is to discern by the right line of law, and not by the crooked cord of private opinion, which the vulgar call discretion (Co. Litt. 227b); and, therefore, if a judge proceeds on a wrong principle, in a matter within his discretion, his order may be set aside on appeal; and if a trustee acts fraudulently or negligently, the possession of a discretionary power will not protect him. And it is also the law, as I understand it, that discretionary trust could be administered by the exercise of prudence and sagacity. Lewin on Trusts, 18; 5 Paige, 485.

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The language of the books is, "If a trustee, whether his duties are by the law or by the instructions given by an individual who may appoint him, is under a duty to follow the directions of the law, or the instructions given by the person who appoints him, and if he exceeds his authority, or disobeys the rules prescribed to him, he acts at his peril, and undertakes responsibility for the consequences." Pennington *v.* Seal, 49 Miss. 544.

Trustees are responsible for violations of their trust, though no bad faith is imputed. Vernon *v.* Board Sups., 47 Miss. 181.

It is no less the rule of law than the suggestion of natural justice that an agent or trustee holding a confidential relation, whether under the law of the land, or by the appointment of an individual, shall conduct the business of his trust with fidelity to those for whom he acts and follow the line of duty prescribed by the appointing power. Pressley *v.* Ellis, 48 Miss. 544. * * *

It is clear, it seems to me, that Mosely's *intention* was that his grandchildren, by his daughter Josephine, should receive "one-half of the proceeds," etc., of his "cash and cash assets," etc., and it was not his intention that the *corpus* of this valuable fund should be turned over to them, or any one for them. The *corpus* was to remain intact, and in such shape as to yield an income or revenue, for the objects of the testatory county. Cannon could determine the method of investment; he could determine in his discretion what form and shape the investment should assume; but he could not say there should be no investment; he could not shirk his voluntarily assumed duty by giving away the fund, or making any disposition of it inconsistent with his fiduciary duties.

A trustee, having accepted a trust, cannot renounce it. If any one undertakes an office for another, he is bound to discharge its duties, and he cannot free himself from liability by mere renunciation. He can only be discharged by a court of equity, or by a special power in the instrument of trust, if or by the consent of all parties interested in the estate, if they are *sui juris;* if all the parties are *sui juris* recourse must be had to a court of equity. Perry on Trust, 401, citing a number of cases.

The office of trustee is one of personal confidence and cannot be delegated. If a person takes upon himself the management of property for the benefit of another, *and if he does,* he will be responsible to the *cestui que trust,* to whom he owes the duty. 5 Read, 517. Wherefore, if a trustee confides his duties or the

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trust fund to a stranger, or to his attorney, or *even to his cotrustee or coexecutor,* he will be personally responsible. * * *

A cardinal and salutary rule for the construction of wills is to gather the intention of the testator, and that intention must be gathered, not from a part or parts, but from the entire instrument. A liberal construction is not to be indulged in which would defeat an intention appearing from the whole will; but we must consider all its parts, and the circumstances under which it was made, as shown on its face, and thereby ascertain the intention of the testator. Haughton *v.* Brandon, 40 Miss. 729; Sorsby *v.* Vance, 7 George, 564; Dean *v.* Nunnally, 7 Ibid. 358.

Chancellor Kent (vol. 4, p. 535) says: "The intention of the testator is the first and great object of inquiry; and to this object, technical rules are, to a certain extent, subservient. The intention of the testator, to be collected from the whole will, is to govern; provided it be not unlawful."

In New York, it was held that, however technical are the words used by a testator, his clear intent will countervail the legal opinion of those words. Lasher *v.* Lasher, 13 Barb. 106.

It is not necessary for the appellants to contend that the laws governing the liabilities and duties of guardians are applicable to this case; but it may be that they may furnish an analogy that may be worth suggesting.

Courts of equity possess an inherent jurisdiction over infants and their estates; their authority in this regard being embraced in every general legislative or constitutional grant of equity powers. Williams *v.* Berry, 8 How. (U. S.) 555; 8 Blackf. 15; *Ex parte* Crumb, 2 Iolins, 439. The jurisdiction of the Court of Chancery over infants so far as relates to their property is very ancient, and probably coeval with the first establishment of the court. It exercised a control over legal guardians at a very early period, removing them in a proper case, or compelling them to give security, and exercising a general supervision over their fiduciary duties. The court has also taken charge of the maintenance and education of infants, directing the application of the income of their estates for that purpose. Spence, Equity, 612, 613; *Ex parte* Phillips, 19 Vern. 122; Wellesly *v.* Duke of Beaufort, 2 Russ. 20. The court has exercised nearly the same control of testamentary guardians as over guardians who derived their authority from the court. Beaufort *v.* Berby, 1 P. 704.

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Brief of Hudson, Hudson & Holt:

The only question for the consideration of this court, as we understand it, is the legality of the payments of appellee to Robert Day, the father of appellants. The remainder of the final account under consideration is not excepted to. This question must be solved by a construction of the will of Joseph R. Mosely. About as large and unlimited discretion and power are given appellee over the subject-matter as could well be conferred by the English language. He is not only authorized to "*control, administer and manage*" the same as he may deem best, but to make "such *investments and dispositions*" thereof "as he may deem best." It follows from this language, when construed in the light of the whole will, that a disposition of the funds to the father of appellees was one fully within the scope of the will. * * *

This property was in the shape of "cash, cash assets, notes, accounts, mortgages, and other claims and choses in action," and was to be used in the payment of all debts and legal liabilities of the testator, as far as necessary, and the balance was to be divided, one half to appellants and the other half to another. * * *

If the court should conclude from the facts that it was the intention of the appellee to turn over the funds going to appellants to their father to be invested or disposed of by him instead of by appellee, then the conclusion must follow that Day was simply the successor of appellee in his trust as to this particular fund, and he is not responsible for the management of it by Day. * * *

It occurs to us that there are really only two questions worthy of discussion in this case; one is, whether or not, under the discretion given appellee by the will he did not have the right to pay the funds to the father of appellants. The other is, did not the payments to Day of this particular fund, in view of the powers under the will and the wording of the receipts and all the circumstances, amount to the selection or appointment of day as a successor as to the particular fund turned over to him? * * *

It is admitted that trustees must follow strictly the powers conferred, but when so large a discretion is given as in this case, then the rule is that the trustee is presumed to have acted honestly and in good faith in the exercise of such discretion, and unless something is shown to the contrary the court will so hold. In Hill on Trustees, page 488, last clause, this language is used: "As a court of equity will not in general assume the exercise of

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a discretionary power, vested in trustees, so it will not interfere to control the trustees acting *bona fide* in the exercise of their discretion." There are a number of cases here referred to. If a court will not interfere to control the trustee in the exercise of his discretion, while acting *bona fide, a fortiori,* it will not, after he has exercised his discretion in good faith, hold him responsible. The court would certainly not presume bad faith in the absence of anything to show or give color to any such presumption.

OPINION—CAMPBELL, J.:

The will of Mosely conferred a very large discretion on Cannon, the trustee, but it was not unlimited. It did not authorize him to do as he pleased with the trust fund, but he was to exercise his judgment "and make such investment and disposition thereof as he might deem best, and to appropriate the revenue, interest, proceeds, and profits of the same to the use and benefit" of the beneficiaries named.

The manifest purpose was to invest the fund and devote the income or profits to the beneficiaries. "Full discretionary power" as to investment and disposition for the purposes of the trust was conferred by the will, but the trustee was bound to have regard to the purposes of the trust and to act in accordance therewith.

It is probable that the devotion by the trustee of part of the trust fund to the discharge of an incumbrance on the "Thomas place," whereby we suppose it was freed from a legal charge upon it and secured to the children of Josephine Day, was a justifiable investment or disposition of so much money as was required for that purpose. All that appears is, that Shepherd received payment of an indebtedness due him from Josephine Day and Robert Day, secured by deed of trust on the Thomas place, belonging to Josephine Day. The character of the indebtedness is not shown. If it was a debt of Mrs. Day, its discharge by the trustee was proper.

The several payments of money by Cannon to Robert Day would seem *prima facie* to be not warranted by the terms of the will and the relation of the parties. Circumstances may have existed to make disbursements of money to Day proper, but they do not appear. Assuming the propriety of the payment to Shepherd, it is highly probable, as argued by counsel, that enough more money

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was rightly applied to the use of the children through payments to their father, Robert Day, to warrant the decree discharging the trustee. This is on the further assumption that the appellee accounted for all he is chargable with.

But the record fails to show satisfactorily what the appellee received under the will, when he received it, and how he disposed of it. He has asked a decree discharging him on account of the trust. It devolves on him to account fully and show himself entitled to be discharged from all further liability to account.

Probably he can do so, but he has not done it, and, therefore, the decree is reversed, and cause remanded for further proceedings in the Chancery Court.

Reversed and remanded April 27, 1885.

PRESTON SMITH v. THE STATE.

Murder — Presumption of Malice.

In a trial for murder where the killing with a deadly weapon is proved and the circumstances attending the killing are in evidence although no express malice appears from the proof it may be presumed from the use of the deadly weapon.[1].

Change of Venue — When Application to be Made.

An application for a change of venue comes too late when made after the trial of the case has been commenced.[2].

Same — Organization of Jury.

In capital cases it is competent for the court to require the State and the defendant to accept or reject each juror as examined and tendered.[3]

1

Where one is accused of murder, the law presumes him to be innocent until the contrary is made to appear; but if it be shown that he killed the deceased with a deadly weapon, the general presumption of innocence yields to the specific proof, and the law infers that the killing, if unexplained, was malicious and, therefore, murder; but if the attendant circumstances be shown in evidence by the State or the accused, the character of the killing is to be determined by considering them. McDaniel *v.* State, 8 S. & M. 401; Green *v.* State, 28 Miss. 687; Mask *v.* State, 36 Miss. 77; Hawthorn *v.* State, 58 Miss. 778; Bishop *v.* State, 62 Miss. 289. (Head *v.* State, 44 Miss. 731; Evans *v.* State, 622 Miss. 289, are in part disapproved.)

The burden of overcoming the presumption by evidence to the satisfaction of the jury is not placed upon the defendant. Hawthorn *v.* State, 58 Miss.

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Statement of the Case.

Same — Uncommunicated Conditional Threats.

In a trial for murder where the plea of self-defense is interposed it is not error to exclude evidence of uncommunicated conditional threats.[4]

Motion for a New Trial — Misconduct of Juror.

When a motion for a new trial is based on alleged misconduct of a juror and the presiding judge hears testimony on same and his conclusion is sustained by the record it will be accepted as true.[5]

At the July, 1884, term of the Circuit Court of Lincoln county appellant, Smith, was indicted for the murder of James G. Evans and at the January, 1885, term thereof he was tried and convicted of manslaughter and sentenced to the penitentiary and appeals. Affirmed. He demanded a special venire which was granted. The court announced that it would examine each juror touching his qualifications and if found to be qualified would be tendered to the State and after being accepted by the State he would be tendered to the defendant who would be required to then accept or reject the juror tendered. Defendant objected to this and his objection was overruled to which he excepted.

The first week of the court expired before a jury had been secured. Before any proceeding to complete the jury on the second

778; Bishop *v.* State, 62 Miss. 289; Ingram *v.* State, 62 Miss. 142; Lamar *v.* State, 63 Miss. 265.

Such presumption should not determine the verdict but it should be considered simply as part of the whole case. Lamar *v.* State, 63 Miss. 265.

Presumption of malicious intent may arise from the nature of the weapon used. Woodside *v.* State, 2 How. 656; McDaniel *v.* State, 8 S. & M. 401.

Such an instruction, erroneous when viewed alone, will not necessitate a reversal if there are liberal charges for defendant in which it clearly appears that the law was properly announced. Bishop *v.* State, 62 Miss. 289.

2

Application for a change of venue, if made after the quashal of a venire, but before the writ for another one is issued, is not too late. Purvis *v.* State, 71 Miss. 706.

3

The State shall make all peremptory challenges before the juror is presented to the prisoner. Stewart *v.* State, 50 Miss. 587.

In a criminal case, not capital, the accused is entitled to a full panel before making his peremptory challenges. Thompson *v.* State, 58 Miss. 62.

If the defendant excuses any of the added jurors, the State must again fill the panel before tendering new jurors. Gibson *v.* State, 70 Miss. 554.

See also Smith & Cavin *v.* State, 61 Miss. 754.

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week defendant applied for a change of venue and the court declined to hear it.

The evidence was to the effect that a hog of defendant had been killed by a son of the deceased and some controversy had arisen between defendant and deceased about it, and on the evening of the homicide defendant went to the mill of deceased where he and others were at work and after being there for a while deceased and others came to where defendant was and in a few minutes defendant asked deceased to step aside with him as he wished to talk with him and they went about twenty or thirty steps and deceased was standing up with his foot on a log on which defendant was sitting and in a few minutes they began to fight which attracted the attention of the bystanders who went to them but when they reached them defendant had stabbed deceased a number of times with a pocket knife inflicting wounds from the effects of which he died almost instantly. No one knew which one struck the first blow. Defendant introduced evidence of threats made by deceased and one witness Watts, that about a week before the killing deceased told him that his boy had killed a hog belonging to defendant and that defendant and his father were cutting up about it, that he would rather fight them than to do anything else unless they would let him alone and he would fight them both at once if

4

On a charge of homicide, uncommunicated threats are inadmissible. Newcomb v. State, 37 Miss. 383.

Threats do not justify an assault and battery, much less the taking of the life of the party making them. Evans v. State, 44 Miss. 762.

Uncommunicated threats admitted in exceptional cases. Kendrick v. State, 55 Miss. 436; Johnson v. State, 66 Miss. 189; Hawthorn v. State, 61 Miss. 749.

5

If a juror without permission of the court separate from his fellows before the verdict is returned, it is good ground for a new trial, though he were attended by a sworn bailiff. Offit v. Vick, 1 Walker, 99.

If a juror not attended by an officer separate from the others for two or three minutes and pass out of the courtroom through a crowd of bystanders, whereby an opportunity was offered for tampering with him, this will vitiate the verdict, and his testimony will not be allowed to show that no such tampering took place. Boles v. State, 13 S. & M. 398; Hare v. State, 4 How. 187; Organ v. State, 4 C. 78.

A juror in the box whispered to a bystander asking him to get the court to let him off that his wife was very sick, to whom the reply was made that it was too late, and nothing further passed between them, is not reversible error. Chase v. State, 46 Miss. 683.

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they continued to bother him. This testimony was excluded by the court on motion by the State. The court gave the following instruction, among others, for the State over defendant's objection:

"If the jury believe from the evidence that the defendant, Smith, with a knife, that was a deadly weapon, cut and stabbed Jas. G. Evans, and thereby killed him, then the use of such deadly weapon is *prima facie* evidence of malice and an intention to murder and before this presumption is overcome it must be shown by the evidence in the case to the satisfaction of the jury that there was no malice or the killing was done in the heat of passion, or that at the time of the use of such deadly weapon the defendant was in immediate, real, or apparent danger of his life or some great bodily harm from the deceased, Evans, and such danger must have been urgent, present, and imminent at the very time of the killing."

Defendant made a motion for a new trial on the ground, among others, that one of the jurors, after being sworn as a juror, had a private and whispered conversation with a person who had been drawn on the special venire but had been found to be disqualified by the court.

On this question the court heard testimony and overruled the motion for a new trial. Defendant appeals.

APPEALED from Circuit Court, Lincoln county, J. B. CHRISMAN, Judge.

Affirmed June 1, 1885.

Attorneys for appellant, Sessions and Cassedy.

Attorney for appellee, T. S. Ford, Attorney-General.

Brief of Sessions & Cassedy:

In support of the first assignment of error, we call the attention of the court to the fact disclosed by the record that the jury that tried the case was made up in part from the special venire, in part from the regular jury for the second week, and completed from the regular jury for the third week. This being the fact, every reason exists to sustain the demand for a full jury, before being required to exercise the right of challenge that is given for the rule announced in Thompson *v.* The State, 58 Miss. 62. * * *

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As to the second assignment of error, that the court refused to entertain or hear the application for a change of venue, on the ground alone that it came too late, we submit that the construction placed by the court upon section 3065 of the Code of 1880 does not comport with the spirit or letter of section 4 of article 12 of the State Constitution, as interpreted by this court in Rattray *v.* The State, 61 Miss. 377. In this case the court, referring to the constitutional provision, says: "This guarantees as a constitutional right a change of venue where *justice and impartiality* demand it and forbids the imposition of any pecuniary charge as a prerequisite." * * *

The petition and affidavits for a change of venue are to be taken as true, and we invite the court to a careful perusal of both, and we think it will be made to appear that the application is within the exception even of section 3065. The court could not know without a hearing of the application whether the ground upon which it was based occurred before or after the drawing of the venire. We insist, however, that notwithstanding section 3065 the appellant had a right under the Constitution to show that he was entitled to a change of venue. * *

We will consider first the sixth cause assigned for a new trial, which was that one of the jurors who sat upon the trial of the cause, after being sworn as a juror, had a private and whispered conversation with a person who had been drawn on the special venire, but had been found by the court to be disqualified. * * *

The rule as announced by this court upon this subject is, that when the acts shown are of such character as may have prejudiced the defendants the presumption is that they did, and it devolves upon the State to establish the fact that such result did not follow. Green *v.* State, 59 Miss. 505.

What transpired between the parties in this private and whispered conversation is not known; the presumption is that it was something prejudicial to the defendant, and this becomes stronger when the ability to explain it by the production of the juror was within the power of the State, and he was not produced.

We will discuss only the third, fourth, ninth, tenth, eleventh, and twelfth instructions given for the State. The third and eleventh announce the proposition that when the killing is proved the burden of proof shifts, and that it must be discharged in one of two ways, and this to the "*satisfaction*" of the jury —

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First, by the facts adduced in evidence against him, or second, by evidence offered by the defendant; but however the presumption is sought to be rebutted, it must be done to the "*satisfaction*" of the jury before an acquittal will follow.

These instructions are condemned by this court in Hawthorn *v.* State, 58 Miss. 778; Bastrop *v.* State, Opinion Book to p. 453; Rosamond *v.* State. Speaking of the instructions given in that case the court says: "It not only imposed on the accused the duty to show that the killing was not malicious, but suggests, if it does not require, that he should furnish a *preponderance* of evidence in support of that negation." He was required by it to show that the killing was not malicious to the *satisfaction* of the jury; and nothing less than preponderant evidence could do this." * * *

An examination of the instructions given for the defendant will show that the error in the instructions referred to were not cured. Taken all together, they are in effect the same as the third instruction given in the Hawthorn case for the defendant, and in that case, it was held that the vice was not cured by the third instruction. 58 Miss. 389, 390.

In this connection we call the attention of the court to the tenth and eighteenth instructions asked in behalf of the defendant but refused by the court, as well as to the testimony of the witnesses, especially that of Hudson and Cox, as to the physical strength of Evans, and we ask that all be considered with reference to that feature of the ninth instruction given for the State, wherein it is asserted that "slight blows with the fist" is not such great bodily harm as would justify a homicide. In the same connection, we direct attention to the tenth instruction given for the State which announces the proposition that though Evans was a *more powerful man physically than Smith* and that Evans struck the first blow with his fist still such facts of themselves would not justify the killing. * * *

The court will bear in mind that the evidence as to the respective strength of the parties was adduced by the State with the exception of the witness Hickman. But by the refusal of the tenth and eighteenth instructions it was all practically withdrawn from the consideration of the jury so far as it might serve to benefit the defendant, but retained by the ninth and tenth instructions given for the State, so far as it was necessary to emphasize the idea of guilt. * * *

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The conversation Evans had with Watts but a short time before the homicide serves to show not only Evans' own estimate of his physical power, as compared with that of Smith, but also his disposition to assault Smith if he demanded pay for the hog, for he said (referring to the defendant and his father), that "he would rather fight them than do anything else, and he would fight them *both at once.*" * * *

If Evans was possessed of the *means* to kill him or do him great bodily harm and was proceeding to do it, Smith had a right to defend himself and kill him, and this without regard to the fact of Evans being armed or unarmed. Miller *v.* State, 74 Ind. 8; 38 Mich. 732; Bangs *v.* State, 60 Miss. 571. * * *

Uncommunicated threats may be admitted in evidence, therefore, even where there were witnesses to the killing if their testimony leaves it doubtful who began the encounter. Johnson *v.* State, 54 Miss. 437. * * * Our statute (§ 2878, Code of 1880), notwithstanding the fact it has been brought forward from Hutchinson's Code and the Codes of 1857 and 1871, and perhaps interpreted in the cases of Green and of Chase, we insist it has changed the common law in reference to self-defense. It says homicide is justifiable when committed in the lawful defense of such person * * * where there shall be reasonable ground to apprehend a design to *commit a felony, or to do some great personal injury,* etc. * * *

In the case of The Commonwealth *v.* Barnacle, 134 Mass. 215, which was an indictment for manslaughter and the plea of self-defense was interposed and the killing was done with a knife as in this case, the issue was sought to be sustained by the defendant, by proof that the deceased was a larger and more powerful man than the prisoner. The proof being rejected by the lower court, the defendant was convicted. On appeal to the Supreme Court, the case was reversed on this point alone, the court in its opinion saying: "The question whether a man has reason to apprehend danger from an attack must depend in some measure upon the size and strength of the assailant. If the assailant is a child or weak and effeminate man much inferior in strength to the party assailed, and unarmed, common experience teaches us that there is no cause to apprehend serious danger from the assault. On the other hand, if the assailant is a large and powerful man whom the assaulted party could not

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successfully resist by his unaided strength, the fact would naturally create in his mind an apprehension of danger which might justify him in using a deadly weapon for self-defense. Certainly it must be competent to show that the assailant was armed with a deadly weapon; for the same reason it may be shown that he is armed by nature with a superior size and strength which makes his attack irresistible and dangerous." * * *

The fourth instruction asked in behalf of the defendant and refused by the court we call special attention to. The court was asked to charge the jury that it was not necessary that the whole jury should have a reasonable doubt as to the prisoner's guilt, but if a reasonable doubt arising from the evidence existed in the mind of any one juror as to the defendant's guilt, then there should be no conviction. The correctness of this instruction as an abstract proposition of law cannot be doubted. It has been sustained by other courts. 19 Iowa, 154; 2 Hawley's Crim. Rep. 603; 14 Cent. L. J. 447. * * *

The tenth and eighteenth instructions refused, announcing that it was proper for the jury to consider the physical strength and power of Evans in determining the question of danger, should have been given; the evidence to say the least tended to show a fact from which danger might be inferred, and in such cases, even in a civil cause, it has been held by this court to be error to refuse such an instruction. Levy *v.* Gray, 56 Miss. 318. * * *

In McKenna *v.* The State, 61 Miss. 591, 592, this court says: "It was not incumbent on the prisoner to do anything more than to raise a doubt in the mind of the jury as to *whether he had a right to believe* that the deceased was at the time seeking to do him some great bodily harm, and that the only way of avoiding this was to take the life of the deceased." * * *

To say to the jury that the use of the weapon is sufficient in law to establish a felonious homicide is to tell them that it establishes it *beyond a reasonable doubt,* for otherwise it would not be sufficient. Stokes *v.* The People, 53 N. Y. 164. We call the attention of the court in this connection and in support of our criticism of the eleventh instruction to the case of Chaffee & Co. *v.* The United States, 18 Wall. 516; 26 Me. 312; 1 Gray, 61; 24 Pick. 373; 7 Blackf. 427. * * *

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Brief of T. S. Ford, Attorney-General:

The first assignment of error is not well taken. It is settled in this as well as other States that in capital cases where the defendant has been served with a copy of the special venire, that it is competent for the court to require the State and the defendant to accept or reject each juror as examined and tendered. Thompson's Case, 58 Miss. 62; Smith & Cavin's Case, 61 Miss. 754. * * *

The court did not err in excluding the evidence of the witness Watts. If for no other reason, it was only a conditional threat, and besides, it was not such a threat as would tend to throw any light upon the attitude of the parties at the time of the killing, of the sort that would have availed defendant in making out a case of self-defense. It was not a threat to kill or to do any felony, or any enormous bodily harm. It was only a conditional threat, "that if defendant and his father continued to bother him, he would fight them both at once." This was not communicated before the killing. The court admitted the other testimony offered by defendant for the purpose of showing that deceased made threat, such as it was. * * *

The facts deposed by the witness are undisputed and are overwhelmingly proven by a number of witnesses. That it was a mutual combat in which the deceased used his fists and the defendant fought with a deadly weapon is clear and undisputed. In other words, it was a combat in which defendant fought under an unfair advantage and with unexampled atrocity stabbed his adversary to death. * * *

The foundation was laid for the purpose of showing to the jury that Smith acted reasonably under the apprehension that he was in danger of life or limb, or enormous bodily harm. * * * A man may repel force by force, but he may not in repelling such attack use more force or other means than are necessary to repel the attack. Blows with the fist do not justify a resort to a deadly weapon and such a use of it as discloses an atrocious intent to take the life of an adversary. * * *

I respectfully submit that the record in this case shows beyond any dispute or doubt that this homicide was not in self-defense, and that if the court had given the instructions propounded, that they would have been as much inapplicable as in a case of assassination. I East. P. C. 277; Chase v. State, 46 Miss. 683;

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Green *v.* State, 28 Miss. —; Wharton on Homicide, § 480. * * *

It was urged that the court erred in the instruction for defendant. * * * This instruction was manifestly refused, because if not misleading it was susceptible of misconstruction and abuse.

What figure was it intended to cut in the case? Was it intended to inform the jury that the twelve men must unite in a verdict before one could be rendered? Or that the case must result in a mistrial if there was one man who entertained a reasonable doubt of the defendant's guilt? It does not say so. No man would have used such language to convey that idea. It tells the jury that if one man doubted defendant's guilt, "there should be no conviction." It does not add "by the jury" or that they should return and report to the court that they could not agree. If the jury found one doubting Thomas, there should be no conviction. * * *

Writing at this time with only the assignment of error before me, and not knowing which particular one of the twelve instructions given for the State is to be assailed, it is respectfully submitted that all of these instructions, with perhaps the exception of the third and eleventh, involve principles so familiar and so often passed upon by this court that it is needless to discuss their propriety. The third contains a principle of the common law approved time and again by the court of last resort in this State. 8 S. & M. 417; 28 Miss. 700; 58 Pa. St. 9; 60 Miss.—, and cases cited. * * * If the principle therein contained in this instruction and the eleventh, is too broad, when construed with the twentieth, twenty-fourth, twenty-ninth, and thirtieth given for the defendant, it will be evident that the law was liberally construed by the court for the defendant, and that altogether the law was correctly given by the court and that no prejudice has resulted to the defendant.

The learned judge heard testimony as to the alleged misconduct of the juror Hoggatt and from the evidence submitted, and from his own knowledge and observation, found the fact adverse to the appellant. This is conclusive.

In conclusion it is respectfully submitted that looking to the whole record in this case, that the verdict of the jury was clearly right and in accordance with law and justice, and that in such

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a case it ought not to be disturbed. 7 Geo. 613; Duwal's Case, 44 Miss. 789.

OPINION.— ARNOLD, J.:

The manner of organizing the jury was not improper and was warranted by the authority of Thompson *v.* The State, 58 Miss. 62; Smith & Cavin *v.* The State, 61 Miss. 754. There was no error in refusing to hear the application for a change of venue at the time when it was made. The law regulates the time and manner in which such application shall be made and heard. It may be made in term time or in vacation, but generally not after a special venire has been drawn, and never after the trial has been commenced and the jury is in part completed. Code, § 3063.

The presiding judge had better opportunities than we have for determining whether or not a conversation occurred, as alleged, with one of the jurors. His conclusion on the subject is sustained by the record, and we accept it as true.

If it be conceded that threats made by the deceased were competent evidence in the state of case shown by the record, still the testimony of the witness Watts was properly excluded. The declarations of the deceased related by him cannot justly be characterized as threats, and the appellant had the benefit of the more positive testimony of other witnesses in regard to threats made by the deceased.

No error was committed in giving or refusing instructions of which appellant can justly complain. The facts of the case did not warrant a more liberal interpretation of the law than was given by the court. Taking the most favorable view that can be suggested in his behalf from the record, and admitting that Evans struck first with his hand, or fist, the appellant was properly convicted of manslaughter.

The judgment is *affirmed.*

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L. E. EAKIN *v.* MOSE GWIN.

Replevin — Parties to Suit.

In an action of replevin where a party appears and defends the suit in a justice of the peace court and makes bond and appeals to the Circuit Court from an adverse judgment and was all along treated as a party, an objection made for the first time in a motion for a new trial in the Circuit Court is without merit even though the affidavit on which the writ is issued does not name them.[1]

Witness — Estate of Deceased Person.

To exclude a party as a witness to prove his own claim or right, it must be against the estate of a deceased person in the suit in which he proposes to testify and the fact that the estate of a deceased person might be prejudicially affected is not sufficient to exclude him.[2]

Rule for Costs — Affidavit of Poverty.

The affidavit of poverty prescribed by statute, §§ 2368-69 of the Code of 1880, answers for the prepayment of costs and also the rule to give security for costs.[3]

Action of replevin by appellee, Gwin, against appellants. From verdict and judgment for plaintiff defendants appeal. Reversed.

1

The record alone shows who are parties to a cause. McPike *v.* Wells, 54 Miss. 136.

The entire record is to be considered, including pleadings, process, and proceedings, in determining who are parties. McCartey *v.* Kittrell, 55 Miss. 253.

Where a railroad company incorporated in another State, and doing business in this State, is sued in the courts of this State, appears by attorney, and pleads to the merits, he cannot on appeal raise the objection that the court has no jurisdiction. Railroad Co. *v.* Wallace, 50 Miss. 244.

Though there is no service of process, where an answer in chancery is signed "counsel for the defendants," this is an appearance and will justify a decree. Lester *v.* Watkins, 41 Miss. 647.

The taking of a bill of exceptions is an appearance. Young *v.* Rankin, 4 Howard, 27.

All persons are bound as parties to a judgment who have the right to protest the proceedings in the cause; to make defense; to adduce and cross-examine witnesses, and to appeal from the decision when an appeal lies. Lipscomb *v.* Postell, 38 Miss. 476.

Appearance cures defective return. Hathcock *v.* Owen, 44 Miss. 799.

In arbitration and award, if the parties appear by counsel, the record need not show that they were notified to appear. Miss. Cotton Oil Co. *v.* Buster, 84 Miss. 91.

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Statement of the Case.

Mose Gwin brought this action of replevin to recover possession of one mule. The affidavit alleges that the mule was wrongfully detained by Daniel McBride and W. A. Treadwell. Appellant appeared and defended the suit in the justice of the peace court and made bond and appealed to the Circuit Court from a judgment for the plaintiff; she appeared there and defended the suit and for the first time raised objection that she was properly a party to the suit in her motion for a new trial after verdict and judgment against her in the Circuit Court.

In the justice of the peace court plaintiff was ruled for the costs; he gave a bond which was not approved by the court and it was ordered that he give bond instanter. Eleven days afterward the case was called for trial and plaintiff made affidavit of poverty prescribed by statute, and defendants' motion to dismiss the suit for noncompliance with rule for costs was overruled.

On the trial, Mose Gwin, plaintiff, was introduced as a witness in his own behalf and testified that he bought the mule in 1882, from F. L. Arnold. Defendants objected to the witness being allowed to testify about any matter or transaction had with F. L. Arnold during his lifetime and offered to show that in

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Better evidence as to notice to the original defendant need not be given. If there is proof that he appeared and contested the suit the judgment will be supported. Redus *v.* State, 54 Miss. 712.

Judgment void for want of a legal summons will be reversed and remanded, but the defendant will be held to be in court for further proceedings. Joiner *v.* Banks, 75 Miss. 382.

Motion to quash process for any defect amendable on motion is such an appearance as dispenses with necessity for the amendment. McClanahan *v.* Brack, 46 Miss. 246; Spratley *v.* Kitchens, 55 Miss. 578.

2

To exclude a party as a witness to prove his own claim or right, it must be against the estate of a deceased person in the suit in which he proposes to testify. Love *v.* Stone, 56 Miss. 449; Cole *v.* Gardiner, 67 Miss. 670; Jackson *v.* Smith, 68 Miss. 53.

The objection is not valid that will remotely and collaterally contribute to or create a liability that may or may not be vindicated in some other proceeding. Griffin *v.* Lower, 37 Miss. 458; Lamar *v.* Williams, 39 Miss. 342; Faler *v.* Jordan, 44 Miss. 283; Love *v.* Stone, 56 Miss. 449; McCutchen *v.* Rice, 56 Miss. 455; Fennell *v.* McGowan, 58 Miss. 261; Combs *v.* Black, 62 Miss. 831; Cole *v.* Gardiner, 67 Miss. 670.

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the early part of 1884, F. L. Arnold sold the mule under a claim of having bought it from plaintiff and that one of the defendants claimed the mule through said Arnold, and that on the institution of this suit Arnold obligated himself to save defendants harmless from any adverse judgment and made the appeal bond from the judgment of the justice of the peace court and afterward died, and that his estate would have to pay any judgment that might be rendered against the defendants.

The court held that these facts did not disqualify the witness and he was allowed to testify over the objection of defendants. Witness then testified that he had bought the mule from said Arnold, and had paid him for it in full, but owed him an account, and that he loaned the mule to one Perkins and said Arnold got the mule from Perkins without his consent and would not let him have it any more but sold it to one of the defendants without his knowledge or consent. The evidence for defendants was to the effect that plaintiff had never paid for the mule and owed Arnold an account besides and that plaintiff voluntarily delivered the mule to said Arnold as part payment on what he owed Arnold.

Defendants' motion for a new trial was overruled and hence the appeal.

This does not apply to the original beneficiary of a life insurance policy, where the policy had been assigned in favor of a third person, by his consent. Cockrell *v.* Cockrell, 83 Miss. 385.

Testimony of heirs of the husband to a contract between him and his wife, made before and in contemplation of their marriage, to the effect that the surviving husband or wife should take only life estate in the property of the other, is not incompetent against the estate of the wife. Steen et al. *v.* Kirkpatrick et al., 84 Miss. 63.

Witnesses are incompetent to testify to establish their own claim against the estate of a decedent. Moore et al. *v.* Crump et al., 84 Miss. 612.

A party plaintiff who has no beneficial interst in the suit is a competent witness for the usee. Hedges *v.* Aydelott, 46 Miss. 99.

Executors or administrators cannot establish items of credits originating in lifetime of decedent. Haralson *v.* White, 38 Miss. 178; Gordon *v.* McEachin, 57 Miss. 834.

Executor or administrator is competent as to matters occurring after death of intestate. McDonald *v.* McDonald, 68 Miss. 689.

Parties to the suit are competent witnesses if the cause of action originated after death of decedent. Witherspoon *v.* Blewett, 47 Miss. 570.

This applies although the decedent conducted the transaction out of which

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Statement of the Case.

APPEALED from Circuit Court, Holmes county, C. H. CAMPBELL, Judge.

Reversed and remanded, April 27, 1885.

Attorneys for appellant, Gwin & Noel.

Attorneys for appellee, Hooker & Wilson.

Brief for appellant:

As admitted, appellee was ruled for, and gave security for costs in the justice of the peace court, on November 29, 1884; as appears by the order of the Circuit Court, appellee was again ruled for costs, his first bond for costs being lost; and it was ordered by the court "that said motion be sustained and that plaintiff do give security for costs instanter." No security was then given, the surety below being tendered and refused, and no further action was taken till the call for trial, which occurred eleven days afterward, one day more than is allowed in any justice of the peace court for complying with a ruling for costs. Defendants below moved to dismiss the case for failure to comply with the above ruling for costs. Then, for the first time, appellee interposed his affidavit of poverty; and the motion was overruled

the transaction arises by an agent who is yet alive and has testified in the case. McCaughan *v.* Hardy, 78 Miss. 598.

An administrator although the distributee of the intestate's estate is a competent witness to establish a claim of his intestate against the claim of another decedent. Cocke *v.* Abernathy, 77 Miss. 872.

The term "estate" is used in its broad and popular sense to signify all property of every kind which one leaves at his death. Jacks *v.* Bridewell, 51 Miss. 881; Green *v.* Mizell, 54 Miss. 220; Rothschild *v.* Hatch, 54 Miss. 554; Jackson *v.* Smith, 68 Miss. 53.

The deposition of a plaintiff, taken during the lifetime of the defendant, and pending suit, cannot be read on the trial after defendant's death and revivor of the suit. Hewlett *v.* George, 68 Miss. 703.

The right of an heir does not originate in the lifetime of the decedent. Covington *v.* Frank, 77 Miss. 606.

3

A litigant who has sued *in forma pauperis* in a justice court cannot appeal from an adverse judgment without bond. Woods *v.* Davidson, 57 Miss. 206.

Security for costs may be given after the expiration of the sixty days and after motion at the succeeding term to dismiss the case. The matter is within the discretion of the court. Martin *v.* Kelly, 59 Miss. 652.

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and the first exception taken. The court's previous order of record was not set aside, but was wholly disregarded and violated. Can a court of its own motion, and without evidence, thus disregard its previous order? After an order requiring security for costs is the time of compliance limitless?

In this instance the affidavit was made an instrument of oppression. The justice of the peace security being insolvent, none being given above, appellee summoned a host of witnesses, only a part of whom testified and some of those on immaterial matters, and their fees alone are about four times the value of the mule.

While it has been held that after a sixty days' ruling for costs, security may, in the discretion of the court, be given, we submit that under the circumstances of this case, especially as no security was given, there was no room for the exercise of such discretion; and that a litigant *in forma pauperis* should be held to a strict conformity to statutory requirements.

After appellee's allowance to proceed with his case, on his affidavit of poverty, he was placed on the witness stand, and examined by the court as to the truth of the statements of his affidavit, and testified that he had a good case, and also a cow, and some hogs, number not given, and that he had asked but two persons, Roly Jackson and J. M. Sargent, to become his sureties for costs, and both agreed to do so, and the first was refused by the court and the other declined after learning the largeness of the costs. He had tried but two persons, and both had shown willingness to become his surety. He might easily have found some solvent person, who, unlike Sargent, might have been undeterred by the size of the cost bill.

It was shown by the evidence offered, and rejected by the court as being immaterial, that one of the appellants claimed the mule through Arnold; and that, upon the institution of this suit, Arnold's duly authorized agent obligated him to satisfy any judgment rendered in this suit for the mule or its value; and that, upon rendition of judgment in justice of the peace court, said agent obtained, in said Arnold's behalf, the sureties on the appeal bond, the agent being one of them, and that the sureties were to protect the principals; and Arnold was obligated to protect the sureties; and that Arnold died before the trial in the Circuit Court, the agent as shown by the evidence being left as his executrix. Under these circumstances, the judgment would be a debt against Arnold's estate, and appellee should not have been allowed to testify the

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matter objected to, in the establishment of his claim against that estate. Without his evidence, on those points, there is no pretense of a case. * * *

The court granted some very liberal instructions to the defense below but nullified their effect by directly contrary instructions for appellee, thus leaving the jury ignorant of which of the two contrary sets of legal propositions were really law.

One of the two refused instructions, the tenth, declares that the jury could not legally find for appellee unless the mule was proven to be in the possession of McBride or Treadwell. The other refused instruction, the sixth, declares in addition to this, that L. E. Eakin is not a party to this suit; and that if the jury believed from the evidence that, at the time of the institution of this suit, the mule was in L. E. Eakin's possession, the jury could not find a verdict for plaintiff.

The correctness of each of these instructions depends upon the question of whether or not L. E. Eakin was properly made a party to this suit. If L. E. Eakin was not, as we think we have properly demonstrated, then the refusal to grant those instructions were errors of vital nature. At that time there was neither proof, nor any agreement, showing that L. E. Eakin gave bond for the mule or appeared in the lower court. According to the record, such agreement, if any, was not made till the motion for a new trial. At that stage of the case, the only evidence in regard to a replevin bond was the officer's return, showing as bondsmen, D. McBride, Mose McBride, and E. E. Eakin. If by E. E. Eakin, L. E. Eakin was intended, then as that name came last, it appears to be only that of a surety.

As the affidavit in replevin, the only matter of pleading in the case, did not make L. E. Eakin a party to the suit, and as her connection with the case, if any, was created and established solely by evidence; then, if such a thing can be done by mere evidence, an issue should have been made, and a verdict had on that question, which would have been an absurdity.

In writing the latter part of our brief, using the original papers for reference, we omitted noticing one of the most objectionable of appellee's instructions which had become separated from the other papers.

It explicitly tells the jury that even if appellee gave his consent to Arnold's taking the mule as a credit on his indebtedness, that the jury, if they believe Arnold's account was then paid, must

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treat that consent as being void not only as to Arnold, but as to any purchaser from him. If such is the law, there is no such thing as an estoppel or protection to a purchaser who acquired property in good faith from a vendor, who holds and disposes of property by the consent of his previous vendor.

Brief of Hooker & Wilson:

The third cause for new trial was the action of the court in allowing the plaintiff to prosecute his suit *in forma pauperis.* This was a matter in the discretion of the court, and certainly under the evidence the court exercised that discretion in a proper and suitable manner.

The fourth cause of error assigned in the motion was the action of the court in allowing plaintiff to testify as to his transactions with F. L. Arnold, deceased, from whom he purchased the mule in controversy. Certainly he is not prohibited by the statute from testifying. The estate of F. L. Arnold is not involved in this suit. If at all, it is only collaterally affected by the results of this suit. Love *v.* Stone, 56 Miss. 499; McCutcheon *v.* Rice, 56 Miss. 455.

Again it is claimed that judgment should not have been rendered against L. E. Eakin. That she was not a party to the suit. It appears from the record that the writ was executed against her. Bonded by her, an appeal bond executed by her, judgment against her and D. McBride, surety, style of the case against her and W. A. Treadwell. The instructions taken as a whole are correct. * * *

If any error was committed by granting plaintiff's instructions, it was corrected by the instructions for the defense.

The sixth and tenth instructions asked by the defense were properly refused. They were based on the theory that Mrs. Eakin was not a party to this suit. The principle invoked that it must be shown that the defendant is in possession of the property in actions of replevin is given in the eleventh instruction. While we do not think the rule applies where the defendant gives bond for the property and litigates the plaintiff's demand, it is useless to discuss the propriety of giving the instruction. The defense asked and got the benefit of the instruction.

OPINION.— ARNOLD, J.:

It was proper to allow the appellee to prosecute his suit after he had made oath of his inability to give security for costs. The

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oath prescribed by statute of a meritorious cause of action, and inability to give security for costs, answers for the prepayment of fees before suit is brought, and the rule to give security for cost, after suit is brought. Code, §§ 2368-2369.

The statute which prohibits a person from testifying as a witness to establish his own claim for or against the estate of a deceased person which originated during the lifetime of such deceased person, etc., did not disqualify the appellee from testifying as to transactions between him and Arnold in regard to the mule. The mule had been sold to the appellants by Arnold in his lifetime. It was not a part of his estate. No claim was asserted against his estate in this suit. The fact that Arnold's estate might be affected by the result of the suit did not render appellee incompetent as a witness in the suit. Love et al. *v.* Stone, 56 Miss. 449; McCutcheon *v.* Rice & Co., 56 Miss. 455; Rothschild *v.* Hatch et al., 54 Miss. 554.

The objection that L. E. Eakin is not a party to the suit is without merit.

It is true she is not named in the affidavit upon which the writ was issued, but as one of the defendants she made bond and appealed from the judgment of the justice of the peace to the Circuit Court, and from the Circuit Court to this court.

It was shown that she was the last purchaser of the mule in controversy, and it does not appear that she anywhere objected to being considered and treated as a party to the suit, until a motion was made by her and her codefendant for a new trial in the Circuit Court.

The contest in the Circuit Court was devoted mainly to the question whether or not appellee was indebted to Arnold at the time the latter obtained the mule. The true issue in the case seems to be whether or not the appellants are *bona fide* purchasers for value, without notice of defect, if any existed, in Arnold's title. If appellee consented for Arnold to have the mule, though his consent may have been obtained by artifice and fraud, and appellants bought from Arnold while in possession, in good faith, for value and without notice of any infirmity in his title, this title must prevail, and appellee's remedy is against Arnold. Lee *v.* Partwood, 41 Miss. 109.

The instructions to the jury and the trial in the lower court were not in accordance with these views, and the judgment is

Reversed and cause remanded.

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W. T. HATCHETT *v.* LOUISVILLE, NEW ORLEANS & TEXAS R. R. Co.

Eminent Domain — Effect of Judgment and Verdict in.

A judgment in an eminent domain proceeding instituted by a Railroad Company to condemn land for railroad purposes gives to Railroad Company the right to deal with the land condemned as they deem most beneficial to it.[1]

Appellee filed its petition in the Chancery Court of Warren county to condemn certain lands of appellant for a right of way. A jury awarded damages, which was paid. Appellee entered and proceeded to cut its surface right of way and also to dig a tunnel by sinking a shaft through the surface of the land and excavating large quantities of earth and depositing it on the surface. Appellant caused the employees of appellee to be arrested for trespassing and gave notice forbidding it from entering upon said land. Appellant then filed the bill in this case praying for a writ of injunction restraining appellant from in any way interfering with the construction of the railroad and from arresting its employees. Appellee answered the bill and made his answer a cross-bill setting up that appellee acquired no right by virtue of the condemnation proceedings to enter upon the surface of the ground over its tunnel right of way. Appellant made a motion to dissolve the injunction, which was overruled, and he appeals.

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The owner can maintain an action for trespass committed outside of the right of way. Brown *v.* Beatty, 34 Miss. 227.

The owner can maintain action for trespass if the railroad company enters before condemnation of the land in the manner specified in their charter, and paying and tendering the amount of the assessment. M. & C. R. R. Co. *v.* Payne, 37 Miss. 700; N. O., J. & G. N. R. R. *v.* Moye, 39 Miss. 374.

Parol license given by the owner is a good defense to an action for trespass against the company. N. O., J. & G. N. R. R. *v.* Moye, 39 Miss. 374.

The owner of the land can exercise full control over the track or roadway of the railroad company, until the company has paid the amount assessed as dar \ges to the owner. Stewart *v.* Raymond Ry. Co., 7 S. & M. 568.

Under a charter provision the Railroad Company has the right to condemn land, not only for a roadbed, but in addition, for station-houses, side-tracks, coal shutes, and other facilities. Ewing *v.* Railway Co., 68 Miss. 551.

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Points of Counsel.

APPEALED from Chancery Court of Warren county, COWAN, Chancellor.

Affirmed, April 27, 1885.

Attorney for appellant, Frederick Speed.

Attorneys for appellee, Murray, Smith & Hirsh.

Brief of Murray, Smith & Hirsh.

The appellee has condemned under authority of its charter, and paid the amount of the judgment, a right of way across the lands of the appellant. Of the right of way so condemned by appellee, 250 feet was condemned for a tunnel and right of way. The appellant contends that in constructing its line through this tunnel, and in constructing the tunnel, appellee has no right to make any entry upon the surface of this tunnel right of way, and no right to break the surface of the earth over said tunnel.

The narrow construction or limitation of appellee's rights acquired under said condemnation proceeding, contended for by W. T. Hatchett, are not supported by the law. A judgment of condemnation is presumed to include all damages not resulting from negligent or unskillful construction of the railroad.

If the appellant has been paid for the acts complained of, and has been awarded a sum sufficient to cover such acts, then he has no right to complain of the Railroad Company for doing them. At the time that the case or condemnation proceeding was tried before the jury, the tunnel was being constructed, and in the very manner that it was being constructed by the railroad, at the time of the arrest of the laborers. Hatchett knew of this, and could have introduced witnesses at this point, and did do so (see p. 27), and the law presumes that he was paid for just such damage as he sought to stop by the arrest of the workmen.

"Damage resulting from tearing down fences or expense in construction of new fences, or in fact any damage not resulting from negligent or unskillful construction, is presumed to be included in the assessment." Mills on Eminent Domain, § 216.

"In assessing damages against a railroad company, all such natural and probable consequences of the works in producing injury as would fairly arise to the mind of an intelligent viewer, must be allowed for." Pittsburg R. R. *v.* Gilleland, 56 Pa. St. 445.

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"The owner is to have appraised to him all damages which he shall be likely to sustain by the occupation of his land for a railway. This must include not only all direct loss in being deprived of the use of the land taken, but all consequential damages to the remaining lands, which may fairly and reasonably be supposed to have been within the contemplation of the commissioners in making the appraisal." Sabin *v.* Vermont Cent. R. R. Co., 25 Vt. 368.

The work, as we have shown, was at the time of the trial of the condemnation proceedings being conducted in exactly the same way as it was at the time the appellant, Hatchett, took steps to stop it by arrest and threatened arrests of laborers. Evidence was introduced on this point; the jury in viewing the right of way stopped at the shaft being sunk, and the work was explained to them. This damage must, therefore, be presumed to have been considered by them. If Hatchett has been paid for sinking this shaft, and for laborers walking on the surface of the ground underneath which the tunnel is being constructed, then the railroad has acquired the right to do the acts complained of, and neither it nor the laborers can be deemed and treated as trespassers.

"This, too, must have reference not only to the running of the road, but to all special and peculiar annoyances during the construction of the road."

"It will be presumed that the jurors included every legitimate subject of inquiry." Tucker *v.* Erie R. Co., 27 Pa. St. 281.

"All damages resulting from the construction of the road to any portions of the land not taken, and being the natural and ordinary consequences of it, for which the owner can claim compensation, are covered by the estimate of the appraisers." Furniss *v.* Hudson R. R. Co., 5 Sanford, 556.

"In assessing damages done to land by reason of the appropriation of a right of way through it for a railroad, the commissioners or jury may take into consideration all incidental loss, inconvenience, and damage, present and prospective, which may be known or reasonably be expected to result from the construction and operation of the road in a legal and proper manner." M., K. & T. R. R. Co. *v.* Haines, 10 Kan. 442.

On the part of the Railroad Company, it is shown that the tunnel is being constructed by an experienced railroad contractor,

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and by and under the supervision of a foreman, skilled and experienced in the construction of tunels.

That the supervision of the whole work is by skilled and experienced civil engineers.

It cannot, therefore, be said that the work is being done in unskillful and negligent manner.

Brief of appellant not found in record.

OPINION.— COOPER, J.:

The bill charges that the company had acquired a right of way over the land of the defendant; the answer denied that the right of way existed as charged in the bill, but states that the same extended as a right of way on the surface of the land only through a portion of the track, and that through the remainder of it, the company had only secured the right to construct a tunnel under the ground, and that the agents of the company were engaged in constructing a shaft from the surface without any right to do so.

The answer is made a cross-bill and with it is filed as an exhibit, a copy of the petition on which the writ of ad quod damnum was issued. By this petition, it is stated that the company desired to condemn "a strip of land 100 feet wide and 1,180 feet long, in all two acres, 258 feet of which is for tunnel purposes," and in another clause of the petition, it is stated that 980 feet is for surface right of way, and 250 feet is for tunnel right of way." Reference is made to a map filed with the petition, but which does not appear with the record. It will be thus seen, that the question argued by counsel for appellant that the condemnation of the right to construct a tunnel does not confer a right to excavate the surface over the tunnel cannot be considered on the record now before us, for in the absence of a map, and the award of the jury, we cannot say that only a tunnel right was secured by the proceedings to condemn. If, as the petition prays, a strip 100 feet wide through the whole tract was condemned, the company had the right to deal with it as they deem most beneficial to it, either to make the tunnel or to excavate a cut of the desired depth.

On the facts shown, the decree is right, and it is

Affirmed.

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LOUISVILLE, NEW ORLEANS & TEXAS RAILROAD COMPANY *v.* J. H. BREWER.

Railroads — Killing Stock — Evidence.

Where an animal on a railroad track becoming frightened at an approaching train leaves the track, as the train slows up, and gets back on the track after the train has resumed its speed and is run over and killed, held that a verdict in favor of the owner will not be disturbed for want of evidence to support it. But where frightened animals run into a trestle ahead of a moving train and the engineer stops the train fifty yards before reaching the trestle, held that this state of facts will not support a verdict in favor of the owner.[1]

This suit was brought by J. H. Brewer against the Louisville, New Orleans & Texas Railroad Company for the killing and injuring of certain live stock belonging to the plaintiff.

While the testimony is conflicting on some points, that which seems to have been accepted by the jury is in substance as follows: The engineer on the north-bound pay car discovered a mule colt and two mares on the railroad track on an embankment south of a trestle; his train was going about thirty miles an hour; he immediately sounded the stock alarm and applied the brakes

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This section has no application to a case where a horse, being off the track, left a safe path through fright and falls or jumps into a ditch. The injury is not inflicted in such case by the running of the cars. Lowe *v.* A. & V. R. R. Co., 81 Miss. 9.

When an animal is killed, if the injury is caused by the animal in its fright running into a trestle, § 1059, Code of 1880, has no application. Railroad Co. *v.* Weathersby, 63 Miss. 581.

Where an engineer sees a frightened horse running before his train on the track toward a trestle, he must stop the train, if possible, in order to avoid injury to the animal from self-infliction or from actual collision, and the company is liable for such injury, if by due care on his part it could have been prevented. Railroad Co. *v.* Newman, 64 Miss. 115; Tyler *v.* Railroad Co., 61 Miss. 445; Railroad Co. *v.* Holt, 62 Miss. 170; Railroad Co. *v.* Thornton, 65 Miss. 256.

In an action for stock killed by a running train, proof of the injury and the value of the animals makes out a *prima facie* case of negligence, under § 1059, Code of 1880, § 1808, Code of 1892, and it is then incumbent on the company to relieve itself of liability by showing circumstances of excuse. Railroad Co. *v.* Doggett, 67 Miss. 250.

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and either came to a full stop or almost to a stop; the animals ran ahead of the train up the track for some distance but before reaching the trestle got off the track; the engineer then started up again, when the colt got back on the track, became badly frightened and ran into the trestle, got caught, was run over by the train and killed.

About dark the same evening a work train going north came to the same point; the head-light was burning brightly, and the engineer discovered the two mares on the track on the same embankment south of the trestle; he sounded the stock alarm and applied the brakes, the animals became frightened and ran up the track and into the trestle and were caught there; the train came to a standstill about fifty yards south of the trestle; the crew alighted and went to the trestle and disengaged the animals, pulled them out of the trestle and left them by the side of the track badly injured by their fall in the trestle.

The dead colt and injured mares were found by Brewer near the track, and he brought suit, claiming $75 for the loss of the colt, and $35 each for the injuries to the mares, a total of $145. On the trial in the Circuit Court the jury rendered a verdict for the plaintiff for $125, and the defendant appealed.

APPEALED from Circuit Court, De Soto county, A. T. ROANE, Judge.

Reversed and remanded, January 10, 1886.

Attorneys for appellant, Percy, Yerger & Percy.

Attorneys for appellee, Powell & Buchanan.

Brief of Percy, Yerger & Percy.

Whilst it is not so stated in terms in the bill of exceptions, yet it appears, with sufficient certainty, that the injuries to stock for which judgment was given were the result of two different occurrences on the same day.

The action was brought for the killing of a mule colt and certain bruises and injuries inflicted upon two mares. * * *

The verdict ought to have been set aside because:

First. The presumption of negligence as to the colt was clearly rebutted. * * * We submit that the case is fully within the doctrine announced in Packwood's Case, 59 Miss. 280. * * *

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When animals are on the track, it can only get rid of them by blowing its whistle and adopting the precautions usual for that purpose. If in their fright, they ran against a tree, stumble over a stone, or jump into a trestle, instead of off the track, is the company responsible? Must there not be evidence of willful recklessness or malicious or mischievous conduct to make the company liable, where the injury to the animal results otherwise than from actual contact with the train? We submit to the court that such is the weight of authority. 11 Pa. St. 176, cited in 13 Am. & Eng. R. Cases, 567 and notes; 13 Am. & Eng. R. Cases. 519; 15 Am. & Eng. R. Cases, 523 and notes; 107 Ill. 577; 8 Barbour, 428; 44 Mo. 292; 10 Ind. 409; 46 Ind. 229; 55 Ind. 575; 60 Ind. 107.

Nor is the contrary idea supported by sound reason. Sounding the alarm is for the very purpose of frightening the animal. It is not only in danger itself, but endangers the train and obstructs commerce. It can only be removed by arousing its fears. If the alarm was properly given, and all proper care and effort were to avoid injuring, then the company is relieved of liability, even though the animal be killed by the train's passing over it.

To say that this is true, but that, nevertheless, under precisely similar circumstances, the company is liable, if the animal is so badly frightened as to jump into some dangerous place and kill or hurt itself, is, we submit, to use the mildest term, unsound. Such doctrine would impose upon the company the necessity of knowing just how much and how little to frighten animals, etc.

Brief of Powell & Buchanan:

* * * * * * * * * * * *

If it be true that the animals were chased by the train for 300 yards south of the trestle and the train never stopped or checked up to allow them to escape, the engineer well knowing that there was a trestle in front, and understanding that the animals in their fright might run into it and be injured, then this would be a very strong circumstance going to show a want of reasonable care.

* * *

Section 1059 of Code of 1880 provides that where satisfactory proof has been made of injury to person or property by the run-

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ning of the locomotives of a railroad company it shall be *prima facie* evidence of negligence on the part of a Railroad Company. In Packwood's Case, 59 Miss. 280, commenting on this statute, the court say: "This of course throws on the company when sued and when such evidence has been adduced the burden of rebutting this presumption, and of establishing by evidence that there has been no negligence on the part of its employees." * * *

When a question has been fairly submitted to the jury, and it is not apparent that they were misled by instructions, the Supreme Court will not disturb their verdict which is warranted by the evidence and which the Circuit Court has approved by overruling a motion for a new trial. Bowen *v.* Henshaw, 56 Miss. 619 and 622.

It is urged by appellant that the verdict of the jury in regard to the two mares was wrong, first, because they say the testimony of our own witness Sam Sampson rebuts all presumption of negligence. We cannot so regard the proof. * * *

The proof shows that there was ample time and opportunity for the train to have stopped and so have allowed the animals to escape in safety from the track. * * *

It will be remembered that the testimony of the three witnesses, Howard, Brewer, and Hopkins, shows that from the tracks of these animals down the railroad they must have been running at great speed. If this was true, and (Sam Sampson also says it was) and the locomotive stopped only fifty feet from the mares, it shows that very slight effort had been made to check the car. All of these facts the jury had the right to consider and by their verdict found that the appellant had not exercised reasonable care and their verdict will not be disturbed unless it is manifestly wrong. * * *

The case cited in the brief for appellant from 11 Pa. St. 176. is not analogous to the one at bar, because of an essential difference between the sections 1166 and 1167 of the Code of Pennsylvania and section 1059 of our Code of 1880. The latter statute broadens the common-law rule which was not affected by the former and the latter virtually establishes the rule of law that railroad companies are liable for consequential damages where injuries occur from the running of their trains unless the presumption of negligence is rebutted by the proof. * * *

A new trial will not be granted because an irrelevant charge was

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given if the jury were fully instructed on the points involved in the issue and it appears they could not have been misled by the charge. Holden *v.* Bloxum, 35 Miss. 381.

Nor will a new trial be granted if upon a view of the whole case justice appears to have been done though the instructions given by the lower court were erroneous. See 45 Miss. 189; 46 Miss. 346; 53 Miss. 201.

The court did not err in the modifications of charges of appellants, "Because this court will not disturb the verdict of a jury if it can be supported by any fair view of the testimony which they may have taken and had a right to take although a particular instruction which embodies a correct abstract principle may be refused if looking at all the instructions given the jury were furnished with such full and sufficient guides as to the law as to enable them to apply it to all the facts in evidence. See Garrard *v.* Stoll, 50 Miss. 148; O'Leary *v.* Burns, 53 Miss. 171; Rothschild *v.* Hatch, 54 Miss. 554.

OPINION.— CAMPBELL, J., delivered the opinion of the court:

We will not disturb the verdict for killing the mule colt, as there is evidence to maintain it, but the verdict is manifestly wrong as to the injury to the two mares. The testimony of the plaintiff's witness Sam Sampson, the only witness who gives a minute account of the injury to the mares, shows that the employees of the Railroad Company used all reasonable care and diligence to avoid injury to the mares, and that they, in their fright, ran into the trestle instead of turning aside before reaching it. He shows that the mares were on the track three or four hundred yards from the trestle, and that the alarm was given, brakes applied, and the train stopped as soon as could be, and at least fifty feet distant from the trestle.

Judgment reversed, new trial awarded, and cause remanded.

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CANTON, ABERDEEN & NASHVILLE RAILROAD Co. *v.* McCOY & CLARK.

Railroads — Suit for Damages — Presumptive Negligence — Instructions.

In a suit against a Railroad Company for damages for the alleged killing of a horse, where the testimony is sufficient to warrant a conclusion that the horse was killed by defendant's train; and there is no explanation of the manner of the killing, the presumption of negligence on the part of the employees of defendant prevails, and an instruction on behalf of plaintiff that:

"If the jury believe from the evidence that defendant's train killed the horse of plaintiffs (on account of which this suit is brought) at or near the corporation line of the town of Kosciusko, and that the train which killed said horse was running at a speed of more than six miles an hour when it reached said corporation line, and that said horse would not have been killed but for the recklessness and negligence of the employees and agents of the Railroad Company, then the law is for plaintiffs, and the jury should find for plaintiffs a sum equal to the proved value of the horse so killed" is not reversible error.[1]

In such case it is immaterial at what rate of speed the train was running, and where the horse was killed.

Appellees, R. G. McCoy and J. A. Clark, composing the firm of McCoy & Clark brought suit in the court of a justice of the peace

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In the absence of eye-witnesses, marks of an animal on the track and the position of its remains may make satisfactory proof that it was killed by the running of the train, which under the statute is *prima facie* evidence of negligence on the part of the company. Railroad Co. *v.* Packwood, 59 Miss. 280.

Code of 1880, § 1059; Code of 1892, § 1808. In an action for stock killed by a running train, proof of the injury and the value of the animals makes out a *prima facie* case of negligence under § 1059, Code of 1880, and § 1808, Code of 1892, and it is then incumbent on the company to relieve itself of liability by showing circumstances of excuse. Railroad Co. *v.* Doggett, 67 Miss. 250.

To escape liability, the company must show the circumstances of the injury and that it is exonerated. It cannot rely on presumptions or conjectures. Railroad Co. *v.* Hamilton, 62 Miss. 503.

The burden of showing due care is not met by proof of care in one respect only, as that a whistle was sounded at the time of the injury. Railroad Co. *v.* Dale, 61 Miss. 206.

Where injury to an animal caused by its running cars is shown, a presumption arises of negligence on the part of defendant, and the court should

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in district number one of Attala county against the Canton, Aberdeen and Nashville Railroad Company for the sum of one hundred and fifty dollars ($150), for the value of a horse alleged to have been killed by one of defendant's trains one night during the latter part of October or first of November, 1884.

Plaintiffs obtained judgment in the justice's court for the full amount sued for and costs; whereupon defendant appealed to the Circuit Court, when plaintiff obtained verdict and judgment for the sum sued for, together with 10 per centum damages and costs of suit.

There was testimony on behalf of plaintiffs that a train or engine of defendant railroad company was run through or about the corporate limits of the town of Kosciusko on the night the horse was alleged to have been killed, at a greater rate of speed than six miles per hour.

The horse was found dead early next morning near the right of way of defendant railroad with marks and bruises on the carcass.

Tracks were found on the roadbed and identified by one of plaintiffs as being those of the horse killed.

There was very little testimony on the part of defendant. The engineer testified that he did not kill the horse and did not see him on the track.

On appeal to the Supreme Court the principal error complained

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not instruct the jury that notwithstanding this presumption if the facts of the injury appear, they cannot find for plaintiff unless these show such negligence. Under the statute the necessity for exculpation from negligence in such case is on the defendant. Railway Co. *v.* Smith, 67 Miss. 15.

If the plaintiff relies solely on the statutory presumption of negligence in the running of cars, and defendant shows that its servants did everything possible to prevent the killing, it is proper to instruct for defendant. Bedford *v.* Railroad Co., 65 Miss. 385.

Under § 1808, Code of 1892, an instruction to the effect that if the mule was killed by the running of the defendant's cars the defendant must show the facts exculpating it by the preponderance of evidence is correct. Southern R. R. Co. *v.* Hayes, 78 Miss. 319.

Presumption should yield to facts where they are sufficiently shown; but it is not error in such a case to instruct a jury that the law presumes wrong, *prima facie* from the fact of injury by the running of cars, etc. Vicksburg R. R. Co. *v.* Phillips, 64 Miss. 693; New Orleans R. R. Co. v. Bourgeois, 66 Miss. 3.

The sections apply to stock trespassing, though in a stock law district. Robards *v.* Mobile & O. R. R. Co., 74 Miss. 334.

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of by appellant was an instruction given by the trial judge on behalf of plaintiffs, as follows:

"If the jury believe from the evidence that defendant's train killed the horse of plaintiffs (on account of which this suit is brought) at or near the corporation line of the town of Kosciusko, and that the train which killed said horse was running at a speed of more than six miles an hour when it reached said corporation line, and that said horse would not have been killed but for the recklessness and negligence of the employees and agents of the railroad company, then the law is for the plaintiffs and the jury should find for plaintiffs a sum equal to the proved value of the horse so killed."

APPEALED from the Circuit Court, Attala county, C. H. CAMPBELL, Judge.

Affirmed, November 2, 1885.

Attorneys for appellants, Anderson & Davis, and W. P. & J. B. Harris.

Attorney for appellees, H. C. Niles.

No briefs found in the record.

OPINION.— ARNOLD, J., delivered the opinion of the court:

Appellees sued appellant to recover the value of a horse alleged to have been killed by one of its trains. There was testimony to show that the horse was killed by the train, at or near the corporation line of the town of Kosciusko, and there was no explanation of the manner of the killing. There was some testimony in regard to a train or engine of appellant being run through or about the corporate limits of the town on the night the horse was killed, at a greater rate of speed than six miles an hour, and the court instructed the jury among other things, to the effect that if appellant's train killed the horse at or near the corporate line of the town of Kosciusko, and the train was running at a greater rate of speed than six miles an hour, when it reached the corporation line, and that the horse would not have been killed but for the recklessness and negligence of the employees of appellant, they should find for appellee.

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The giving of this instruction is the principal error complained of. Our conclusion is, that as the testimony was sufficient to warrant the conclusion that the horse was killed by the train, and as there was no explanation of the manner of the killing, the presumption of negligence on the part of the employees of appellant prevailed, and it was immaterial at what rate of speed the train was running, and where the horse was killed.

Affirmed.

W. B. WALKER, Administrator *v.* MRS. JANE SAUNDERS.

Resulting Trust.

If a party purchases land and pays for same with his own money but has the deed made to a third party, without consideration, for the purpose of defrauding his creditors, no trust results to him and the court will leave him in the position in which he placed himself.[1]

Evidence — Objection for the First Time in Supreme Court.

Objection will not be heard for the first time to evidence in the Supreme Court, although irrelevant to the issues made by the pleadings, as it would be proper to allow the pleadings amended if objection had been made in the lower court and it will be treated as part of the case made by the record in the Supreme Court.[2]

Appellant as administrator of the estate of Miss Mattie B. Moore filed his petition to sell certain real estate in the town of Aberdeen to which Miss Mattie B. Moore had title at her

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A resulting trust can be raised only when the consideration was paid by one party and the conveyance was taken in the name of another; or where trust money has been used in the purchase of property. Walker *v.* Brungard, 13 S. & M. 723.

It will not be raised by an agreemnt merely to purchase for the benefit of another — the purchaser using his own means in the purchase and buying in his own name and being under no fiduciary relations which would prevent him from purchasing. Walker *v.* Brungard, 13 S. & M. 723.

Where land is purchased and paid for by one who takes the title in the name of another for whom he is under a legal or moral obligation to provide, or toward whom he stands *in loco parentis*, the purchase is presumed to be a settlement and not a trust for the purchaser; but this presumption may be rebutted by evidence. In this case a brother for his dependent sisters held to be a settlement. Higdon *v.* Higdon, 57 Miss. 264.

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Statement of the Case.

death, to pay debts of deceased. Appellee filed the bill in this case seeking to enjoin the sale and alleged that in 1880, L. B. Moore purchased the land and paid for it but had the title placed in the name of his sister Mattie B. Moore; that Mattie B. Moore died in 1882 and afterward her heirs-at-law conveyed it to said L. B. Moore who sold it to his wife who in turn sold it to appellee. The bill alleges that Miss Mattie B. Moore had only the legal title to said property and that it was held by her in trust for said L. B. Moore. The bill prayed for an injunction perpetually restraining appellant from selling same and for the cancellation of his claim as a cloud on complainant's title. Defendant answered denying that there was a trust in favor of L. B. Moore. L. B. Moore testified that he purchased the land in question and paid for it with his own money and had the deed made to his sister Mattie Moore; that no part of the purchase money was paid by her.

A conveyance made to hinder, delay, or defraud creditors is only void as to them; it is good as against the grantor and his heirs. Shaw *v.* Milsaps, 50 Miss. 380.

A conveyance cannot be vacated at the instance of the grantor upon the mere ground that it was made without consideration. Though voluntary, it is binding upon him. Day *v.* Davis, 64 Miss. 253.

Conveyances though fraudulent as to creditors are good as between the parties, and will not be canceled at the suit of the grantor; nor will equity decree specific performance of an executory agreement by a fraudulent grantee to reconvey property to the debtor. *Ex turpi causa non actio oritur.* Walton *v.* Tustin, 49 Miss. 569.

Where one indebted beyond his ability to pay purchases land with his own means, and causes the title to be placed in another, the law conclusively presumes a purpose on his part to defraud creditors. The intention being unlawful, no trust arises in his favor. Simmons *v.* Ingram, 60 Miss. 886.

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This court will not entertain questions not raised below. Anderson *v.* Leland, 48 Miss. 253; Griswold *v.* Simmons, 50 Miss. 137.

Objections to testimony made for the first time in a motion for a new trial will not be noticed here. Cook *v.* Ligon, 54 Miss. 368.

Objection to the introduction of secondary evidence to prove a written contract must be specifically made when the evidence is offered: otherwise this court will not notice the objection. Ketchum *v.* Brennan, 53 Miss. 596.

This court will not sustain the exclusion of evidence upon grounds not shown to have been made in the court below, unless the evidence be inadmissible under any circumstances. Decell *v.* Lewenthal, 57 Miss. 331.

A party will be held to the precise ground of objection made to a deposition below. Icis Co. *v.* Green, 52 Miss. 332; Love *v.* Stone, 56 Miss. 449.

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Statement of the Case.

James Moore testified that he knew that L. B. Moore purchased the land with his own money from H. Murphy, that Miss Mattie Moore was the sister of L. B. Moore and was living with him at the time the land was bought, and that she had no money to buy land with and no means of getting any, and that she was supported by L. B. Moore. On cross-examination he said he thought there were some judgments against L. B. Moore at that time.

For defendant several judgments against L. B. Moore were introduced which were unsatisfied at the time the sale was made. No objection was made to the introduction of these judgments. H. Murphy testified that L. B. Moore bought the land from him in 1880, and on the way home, L. B. Moore said to him "make the deed to my sister Mattie Moore," and knowing that there were some judgments against him and presuming he wanted to avoid being annoyed by these creditors I told him he need not do that as he was the head of a family and it would be exempt

Where objection to evidence is, in its nature, such as may be obviated, it must be specific, so as to allow opportunity to supply its place; otherwise, the objection will not be noticed in this court. Heard *v.* State, 59 Miss. 545; Ex parte Phillips, 57 Miss. 357.

If no objection be made to the admission of evidence when it is introduced, objections to it are considered as waived. Skinner *v.* Collier, 4 How. 396.

It will be too late to raise the objection on a motion for a new trial. Union Bank *v.* Graves, 12 S. & M. 130.

Objections to the introduction of evidence, which, from their nature, may be obviated by the party offering it, must be distinctly stated on the trial, otherwise they will not be noticed. Morris *v.* Henderson, 37 Miss. 492; Wesling *v.* Noonan, 31 Miss. 599.

As a general rule, questions cannot be raised in the high court which were not raised in the court below. To originate and decide questions here would be to assume original jurisdiction. The office of this court is to revise the action of the court below, and not to originate new questions here, not acted on there. Doe *v.* Natchez Ins. Co., 8 S. & M. 197; Commercial Bank of Manchester *v.* Martin, 9 S. & M. 613.

An objection to the competency of evidence not raised in the court below will not be noticed here. Neely *v.* Planters' Bank, 4 S. & M. 113.

The high court will not notice any objection to evidence, not raised in the court below. Chew *v.* Read, 11 S. & M. 182.

Objections to the admission of evidence should specifically point out the ground on which they are based, so that if capable of being removed by other proof it may be introduced. Doe *v.* Natchez Ins. Co., 8 S. & M. 197; Routh *v.* Agricultural Bank, 12 S. & M. 161; Morris *v.* Henderson, 37 Miss. 492; Monk *v.* Horne, 38 Miss. 101.

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to him, and he replied that that was not his object but that he had spent her part of her mother's estate and he desired by this deed to repay her; that at the time the sale was made L. B. Moore was insolvent and there were judgments against him and one or more in which executions were returned "no property found."

From a final decree perpetually enjoining the defendant Walker, administrator, from further prosecuting his suit for the sale of the land and adjudging the legal and equitable title to be in complainant, this appeal is taken by the defendant.

APPEALED from Chancery Court, Monroe county, L. HAUGHTON, Chancellor.

Reversed and remanded, May 11, 1885.

Attorneys for appellant, Murphy & Walker, and Calhoun & Green.

Attorneys for appellee, A. H. Whitfield and G. C. Paine.

Brief of Murphy & Walker:

* * * * * * * * * * * *

The facts show a want of "manifest intention of the parties at the time of the transaction to create the trust relation," and, therefore, no such relation exists. 4 Kent Com. 305; 2 Story Eq. 438; Perry on Trusts, § 147; Capers *v.* McCaa, 41 Miss. 487; 2 Pom. Eq., §§ 1031, 1040; Adams, Eq., 33, 34.

* * * * * * * * * * * *

The facts in this case are stronger against the idea of a resulting trust than those of another case which justified this court in deciding against the attempted resulting trust. Higdon *v.* Higdon, 57 Miss. 264; Hill on Trustees, 97; Dyer *v.* Dyer, 2 Cox, 92; Ebrand *v.* Dancer, 2 Ch. Cas. 26; Loyd *v.* Read, 1 P. Wms. 607; Benbow *v.* Townsend, 1 M. & R. 506; Perry on Trusts, 143; 2 Pom. Eq., § 1039, note 1, § 1041; Forest *v.* Forest, 11 Jun. (N. S.) 317; Sayre *v.* Hughes, L. R., 5 Eq. 376, 380; Smith *v.* Patton, 12 W. Va 541.

* * * * * * * * * * * *

On the strength of the ownership of this property with the

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title thereto spread upon the public records, Miss Moore contracted debts and incurred obligations which the *post mortem* claim of L. B. Moore cannot deprive of their lien. Coleman *v.* Semmes, 56 Miss. 329; Perry on Trusts, § 142.

Moore was insolvent at the time of this transaction, and a conveyance of the kind alleged would have been a fraud upon his creditors. He could not reserve to himself a secret benefit. Trimble *v.* Doty, 16 Ohio St. 118; Robinson *v.* Robinson, 17 Ohio St. 480; Perry on Trusts, § 142; Bump on Fraud Conveyances, 325, note 2 (3d ed.).

* * * * * * * * * * * *

Brief of Calhoun & Green:

* * * The bill in this case does not proceed on the ground of a *resulting* trust.

It proceeds only on the ground of an *express oral* trust. It avers that L. B. Moore paid the money and directed the deed to be made "to Mattie B. Moore, *that the legal title thereto might be held in trust* by said Mattie B. Moore *for the sole use* of him, the said Lucien B. Moore."

It then proceeds to aver "that the said deed made to her, the said Mattie B. Moore, as aforesaid, was accepted by her, *with the understanding* that she derived no beneficial interest in said lands, but that she was simply the holder of the legal title thereto *for the benefit of the real* owner, the said Lucien B. Moore," and there is nothing said of any other than this *express* verbal trust.

Here then was an express oral agreement between L. B. Moore and his sister that he should buy the land, pay for it, have the title vested in her, and that she should hold it in trust for him, and it is this agreement or "understanding" which the bill seeks to enforce.

This may not be done. It is a declaration of trust not in writing and is void. Code, § 1296.

* * * * * * * * * * * *

Brief of George C. Paine:

* * * L. B. Moore testifies emphatically that he paid for the property with his own money, and had the title made to Mattie B. Moore in trust, clearly negativing any idea of an advancement or gift. 48 Miss. 95; Perry on Trusts, §§ 124-127; Story, Eq. Jur., § 1195; Pomeroy, Eq., §§ 1037, 1038.

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The doctrine announced in 48 Miss. 95, *ubi supra,* is a recognized doctrine of equity jurisprudence in this State; it was first announced in 1 How. 358, and has been enforced and adhered to down to the latest utterances of this court. 59 Miss. 148.

* * * The fact that L. B. Moore was the brother of Mattie *will not defeat the trust.* Perry on Trusts, § 144, bottom p. 159.

He must be under some legal or moral obligation to provide for the beneficiary, or stand *in loco parentis.* Perry on Trusts, § 114, p. 160; 57 Miss. 264.

And even then, this obligation and attitude may be rebutted by evidence. 57 Miss. 264.

L. B. Moore had not placed himself *in loco parentis* to Mattie B. Moore, nor did he occupy that attitude to her. Jas. Moore, in explanation to his answer to interrogators, states that whatever landed estate Mattie had he looked after and managed it. * * *

The facts in the case of Higdon *v.* Higdon, 57 Miss. 264, are not analogous to those under consideration. In Higdon *v.* Higdon, the appellant was the only brother, and had purchased at sheriff's sale the old homestead, where appellees had resided from infancy, and was at the time of the purchase "well off." At the time of the purchase he resided in Tennessee. Years afterward, meeting with reverses in fortune, he returned to the old homestead. His aunt, for an express valuable consideration, conveyed her interest in the estate to appellant.

In the case under consideration, the property had never been in the family. L. B. Moore was less able, physically and pecuniarily, of any of the brothers, to provide for Mattie. James, one of her brothers, was the manager of her landed interest. * * *

Brief of A. H. Whitfield:

* * * The question is purely one of intent on the part of L. B. Moore, and that intent is to be gathered from all the acts, declarations, and circumstances surrounding the transaction. L. B. Moore was not, as in Higdon *v.* Higdon, the only brother; not the best off financially of the three; he had nothing at all except this property; he had another unmarried sister, Rebecca, just as near to him as Mattie; he had married, or was about to marry; and yet the preposterous proposition is urged that thus situated himself, and with two brothers better able than himself to support the two unmarried sisters, with one of whom, Jas. Moore, they lived as

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much as with L. B. Moore, and with Jas. Moore, executor of his father's will and manager of her own estate — L. B. Moore meant (a) to deprive his own wife of a home; (b) to give everything he had to one of two unmarried sisters, both equally dear to him, and equally dependent; (c) and this too, when it was more binding morally and legally upon Jas. and Stephen than upon himself to support Mattie. It is not to be presumed that under these circumstances, one of the brothers, by allowing two sisters to spend part of their time with him, is to be placed, *in invitum, in loco parentis* to one of them, with the liability which that relation carries; bound as a father would be, permanently; and that too, against his own solemn oath. * * *

And it has been expressly adjudged, that even when it is conceded one stands *in loco parentis,* it will not be an advancement, where the relative is a brother. 1 Perry on Trusts, § 144.

Adams in his Equity, p. 34, note, lays special stress on the nearness of the blood tie; and L. C. Baron Eyre, calls the fact of a deed being made of even father to son "a mere circumstance of evidence." It is the intent that governs. * * *

Indeed counsel for appellant themselves seem to be satisfied that they are without any standing on the evidence here, by attempting — not in the pleadings, in which case the charge would have been met and summarily repelled — but *arguendo* in this court *for the first time,* to show that L. B. Moore made the deed to defraud his creditors. But appellant will not be allowed to make such a point *here,* for the *first* time, in argument, when he has never given notice in the pleadings that this point would be made. It would be unjust to appellee, who stood ready, if it had been made, to overthrow the charge by the most conclusive evidence.

* * * The pleadings must set up the fraud if it is to be relied on. Bodine *v.* Edwards, 10 Paige (V. T.), 504; Elliott *v.* Horn, 44 Am. Dec. 488; Stewart *v.* Inglehart, 28 Am. Dec. 206, note; McLue *v.* Campbell, 32 Am. Dec. 783.

"If," says this court in 45 Miss. 564, in the case even of an outstanding judgment, "the defendant relied on an outstanding debt to overcome the complainant's equity, he ought by his answer to have given notice to the complainant that he took issue on that point, and thus have made it a subject on which his adversary should be prepared with evidence."

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If he had shown the fraud, clearly that would have made the property liable, not to Mattie's debts, but to L. B. Moore's creditors, and they are not represented here, if there are any. I quote the note, p. 170 of Adams' Eq. (3d Am. ed.). "And under *all* circumstances where the conveyance is in fraud of creditors, a sufficient interest remains in the parent to subject it in equity, to the claims of his creditors," citing many authorities. Now it certainly cannot be liable to the creditors of L. B. Moore and Mattie Moore also. * * *

OPINION.— CAMPBELL, J.:

The evidence introduced without objection on the hearing in the court below strongly suggests that the object of L. B. Moore in causing the title of the land he paid for to be conveyed to his sister was to defraud his creditors, and if this was his object, no trust resulted to him, because the courts will not interfere in behalf of one who has acted in violation of law. He will be left in the position in which he placed himself, and cannot have any aid to relieve him from the legal consequence of his own act. 1 Perry on Trusts, § 165.

It is urged that the evidence of unsatisfied judgments against Moore when he paid for the land, and directed it to be conveyed to his sister, was irrelevant to the issue made by the pleadings and should not be considered here. It is a part of the case as made by the record before us, and must have been so considered in the court below. It was received without objection, so far as the record shows.

Had objection been made, an amendment of the answer to meet the objection would have been proper.

Considering all the evidence in the case, we think it clear that no trust resulted to L. B. Moore by reason of his payment of the purchase money of the lot, and

We reverse the decree, but will not make a decree here; and remand the cause to the court below, where such further proceedings may be had as are proper in the opinion of the chancellor.

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G. S. MITCHELL et al. *v.* J. M. BISHOP.

Notice — Subrogation.

Where R. purchased land with notice that parties in interest did not join in the conveyance, he, and those claiming under him, will be denied subrogation to the rights of grantor's creditors.[1]

Mitchell and others, appellants, were complainants, and J. M. Bishop, appellee, was defendant, in the court below. From a decree dissolving an injunction and denying complainants' prayer for relief against defendant, complainants appealed to the Supreme Court.

The bill of complaint alleged, in substance:

That one Russell T. Jones, was, during his lifetime, seized and possessed of certain lands and other property; that on or about January 3, 1862, in consideration of $10 and of his wish to divide the balance of his estate equally among his eight children, he con-

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Subrogation applies only where one paying the debt of another stands in the relation of a surety, or is compelled to pay to protect his own rights. An administrator is under no obligation to pay a judgment against the intestate with his own funds, and if he does so, though for the purpose of saving something for the heirs, he will not be substituted to the right of the judgment creditor. But he would have the right to retain, out of the assets of the estate, the amount so advanced. Slaton *v.* Alcorn, 51 Miss. 72.

Where the purchaser of incumbered property pays off one of the incumbrances of equal dignity with those remaining, he will be entitled to be subrogated to the rights of that incumbrance, and to have a *pro rata* distribution of the proceeds of the property when sold to pay the incumbrances. Ross *v.* Wilson, 7 S. & M. 753.

The jurisdiction of equity to grant relief by subrogation rests largely upon the prevention of frauds and relief against mistakes, and the expansion of the rule has so nearly covered the field that it may now be said that wherever a court of equity will relieve against a transaction it will do so by the remedy of subrogation, if that be the most efficient and complete that can be afforded. Dorrah *v.* Hill, 73 Miss. 787.

One who is under no legal obligation to pay, but who, at the request of the debtor, discharges part of a debt secured by a deed of trust on his land, is not, in the absence of any agreement to that effect, express or reasonably inferable from the facts, entitled to be subrogated to the rights of such beneficiary. Good *v.* Golden, 73 Miss. 91.

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veyed to said children certain lands together with some personal property, which constituted all the property then possessed by the grantor.

That the conveyance was a voluntary one and fraudulent and void as to the creditors of the grantor; and that shortly after the Civil War, when the courts were opened to creditors (having been closed by legislative enactment) the creditors of said Jones were seeking to enforce the collection of their claims, and were threatening to have said conveyance set aside as fraudulent as to them, and to have the proceeds arising from a sale of said lands under order of court applied to the payment of their claims; that, moved to action by the probability of such a proceeding, the said Jones and others (the grantees in the conveyance of January 3, 1862), conveyed to one James P. Rice a part of the aforesaid lands on July 23, 1866, for the sum of $2,300, which said sum was alleged to have been paid to one C. G. Mitchell, successor in the guardianship and administration of A. J. Duncan, deceased, who, as such guardian or administrator, or both, was alleged to be a creditor of said Jones at the time of the aforesaid alleged voluntary conveyance to a large amount, which said debt was alleged to have been secured by an unrecorded deed in trust. That said purchase money was paid to such creditor by Rice at the solicitation of the grantor, Jones, the creditor acting in good faith and on agreement and understanding between said Jones and Rice that such conveyance was null and void as to his other creditors, and that said Jones' children could only hold said property conveyed to them subject to Jones' debts thereon, and that as such purchase money paid by Rice was paid upon Jones' indebtedness, that the said Rice's rights should be subrogated to the rights of the said creditors and said conveyance be void as to them.

That complainants' title to said land deraigned from said Rice and that he and those claiming under him had been in open, continuous, notorious, and adverse possession of said lands since July 23, 1866, and in peaceable possession of said land until August, 1880, when an action of ejectment was brought by defendant J. M. Bishop in the Circuit Court of Union county against the complainants in this bill; the said Bishop claiming title by descent through his deceased wife and three deceased minor children.

The bill further alleged that Bishop's wife knew nothing of the aforesaid voluntary conveyance by said Jones and never accepted

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same; that Bishop was barred by the Statute of Limitations from instituting his action of ejectment.

That at the time of such voluntary conveyance by Jones to his children, the said Harriet Bishop was residing in Grenada, Miss., a considerable distance from her father, the said R. T. Jones; that during her lifetime she set up no claim and exercised no acts of ownership to said land, wherefore said conveyance was void as to her.

That the defendant was prosecuting his action of ejectment without tender to complainants of their equitable portion of the purchase money paid for said land and applied to the payment of Jones' debts. The bill further alleged that Bishop's remedy was more complete in equity than in law and prayed that he be made a defendant to the bill and that he be enjoined from prosecuting his action of ejectment against complainants.

That the complainants or orators be decreed subrogated to the rights of the creditors of said Jones; that they were such at and before the execution of such voluntary conveyance.

Orators further prayed that said voluntary conveyance be declared null and void as to orators, with the alternate prayer that an account be taken of the proportion of purchase money, with interest, due by said Bishop, and that it be applied to the payment of Jones' debts, together with the value of the permanent and valuable improvements placed upon the land by orators; and that the proportions of the rent of said land that would be due said Bishop be offset against the other, and if an amount should be found to be due orators, that they be declared to have a lien on the interest of said Bishop in said land.

The bill concluded with a prayer that on final hearing the injunction prayed for be made perpetual.

The answer admitted the conveyance of January 3, 1862, but denied that it contained all the property of the grantor, and that said conveyance was fraudulent or void as to creditors, or any one else.

Denied that said Jones was largely indebted, and certainly not to the value of the property conveyed, but alleged that his indebtedness was for trifling sums, and that he was loaning money before and after said conveyance as shown by the deed itself.

Respondent denied that the many slaves conveyed in said deed were of little value at the time of conveyance, but alleged that

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on account of recent victories of the Confederate army the people expected a successful termination of the war. Answer further denied that no property remained to said Jones at the close of the war.

Respondent knew nothing of the threats of creditors of Jones to enforce their claims and asked strict proof of same, and denied that Jones or any of his children knew that said conveyance could be successfully attached, and asserted said charges to be a slander upon Jones and his children; alleged Jones' ability to pay his debts and that if he ever were unable to pay any of his obligations such inability came about after said conveyance and was due to the defeat of the Confederate army. Respondent further denied that Jones and his children knew said conveyance to be void as to them and that Mrs. Bishop desired to join in said conveyance; but alleged that she never did join in such conveyance, but claimed the property as her own against all the world from the date of execution of such conveyance to the extent of her interest in said property.

Respondent alleged that Mrs. Bishop knew nothing of the alleged payment of $2,300 by Rice, nor of the application of same to the debts due Duncan, and demanded strict proof of same, denying the truthfulness of such allegation. Respondent denied, upon information and belief, that said Duncan was a creditor on date of said conveyance, and that such debt was secured by any deed in trust, or lien of any kind, recorded or unrecorded; but, on the contrary, asserted such to be false and demanded complainants' grounds for such a belief.

Answer further denied adverse or peaceable possession, but alleged that the conveyance to Jones' children was recorded at once, as was also the deed to Rice, and that the latter deed showed on its face that Mrs. Bishop did not join in the conveyance, and that complainants had full knowledge of the rights of Mrs. Bishop and of respondent. Respondent alleged that Harriet Bishop, his wife, died June 8, 1865, and that the fee simple title to her interest in said property descended to her three minor children, all of whom died in Grenada, Miss.; and that respondent's wife died before the deed to Rice, and that the Statute of Limitations did not run against the said minor children; and that adverse and peacable possession by complainants and those claiming under them for ten years before the institution of the ejectment suit was not true.

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Respondent further denied that his wife, Mrs. Harriet Bishop, knew nothing of the deed from Jones, but averred that she was cognizant of same and accepted said conveyance on its execution and claimed it as her own to the day of her death; and that she was fully acquainted with all the facts incident to said conveyance and knew that the property was not to be divided for four years after the execution of said deed, and that respondent's wife died before the expiration of such time. Answer alleged that the grantees farmed the lands for four years from the date of said conveyance and that respondent's wife received only $100 from such property during such time. Respondent admitted instituting the ejectment suit in August, 1880, without tendering to complainants any money, and alleged that he owed them nothing.

Respondent alleged that a part of the land so conveyed by Jones to his children was, after four years from the date of execution of such conveyance, sold for several thousand dollars, and that the proceeds from such sale were divided among the other living children, his wife's children getting nothing.

Answer alleged that complainants' bill was filed for delay, and concluded with prayer for dismissal of the bill and dissolution of the injunction.

The chancellor heard testimony on both sides, denied the relief prayed for by complaints, dismissed their bill, and dissolved the injunction.

APPEALED from Chancery Court, Union county, B. T. KIMBROUGH, Chancellor.

Affirmed, February 1, 1886.

Attorneys for appellant, Fontaine & Mitchell.

Attorney for appellee, W. H. Fitzgerald.

Brief of Fontaine & Mitchell:

* * * * * * * * * * * *

In the year 1866, Jones, together with seven of his children, knowing that said conveyance could and would be vacated, sold this land conveyed (by Jones to his children by said voluntary

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conveyance) to one Rice under whom appellants claim, and the purchase money was paid directly by Rice to C. G. Mitchell, at the request of Jones, in payment of Jones' indebtedness to Mitchell. Now Mitchell was a creditor of Jones at this time, and before the voluntary conveyance was made could have successfully attacked said voluntary conveyance and subjected the property therein conveyed (the land sued for) to the payment of his debt; which payment to Mitchell he consenting thereto, at Jones (the debtor's) request, had the effect of subrogating Rice to the rights of Mitchell, to subject the said lands to the payment of the purchase money therefor. Staples *v.* Fox, 45 Miss. 680; Slaton *v.* Alcorn, 51 Miss. 72; Sheldon on Subrogation.

And Rice's vendees, appellants in this cause, succeeded to all the rights that Rice had in the premises, although not conveyed to them. Sheldon on Subrogation, § 34. * * *

And again, where at an administrator's or executor's sale of land either devised or descended, however informal or irregular such sale, if purchased in good faith and purchase money paid, and applied to debts of testator or intestate, devisees or heirs are estopped without refunding purchase price. Cole *v.* Johnson, 53 Miss. 94; Gaines *v.* Kennedy, 53 Miss. 104.

Again, complainant's vendor, Rice, so far as defendant is concerned, does not occupy the attitude of a volunteer; he purchased the interest of seven of the volunteer grantees and in order to protect his purchase was compelled to pay off the debts of the said Jones existing at the time, and as to all the land including the interest of defendant should be subrogated to the benefit of the debt. Sheldon on Subrogation, §§ 30, 36, 40, and 129; Slaton *v.* Alcorn, 51 Miss. 72.

Brief of W. H. Fitzgerald:

* * * * * * * * * * * *

It is not necessary for the purposes of this case to combat the argument of counsel for appellants on the subject of subrogation.

Dr. Mitchell, the witness, had a debt against Jones before and at the time the conveyance was made by Jones to his children. He says there were other debts besides his; that his was a simple contract debt; that the property was sold to Rice in order to get the money to pay him, and that the money instead of being paid directly to Jones *et al.*, and by Jones paid to him, it was paid to

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witness at the request of Jones and witness' debt against Jones was thereby discharged. * * *

Besides the constructive notice that Rice had by the recorded deed from Jones to his children, it is clear from the insertion of J. M. Bishop's name in the deed that he had actual notice that there was an outstanding interest he was not acquiring by the deed. He got, therefore, only what he bargained for and paid his money for, and the appellants, his vendees, have no grounds to complain. * * *

The witness, Dr. Mitchell, to whose rights the appellants are sought to be subrogated, knew very well of the outstanding interest of the Bishop children, and received his money with the knowledge that it was obtained by a sale of the land, less the undivided interest of the Bishop children. * * *

OPINION.—ARNOLD, J., delivered the opinion of the court:

The decree of the court must be affirmed. If the facts alleged by appellants are true, they are not entitled to the relief sought.

Rice, through whom appellants claim, purchased the land in question with notice of appellee's title, and got what he bargained and paid for, and is protected by covenants of warranty in the deed made by his vendors. Rice was a stranger and purchased the land without being compelled to do so, for the preservation of any rights or property of his own, and the doctrine of subrogation does not apply in such case. Slaton *v.* Alcorn, 51 Miss. 72; Sheldon on Subrogation, § 240 *et seq.*

Affirmed.

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JACOB BARNETT v. J. M. JAYNE.

Instructions — Objection to.

Objection to instructions will not be heard for the first time in the Supreme Court.[1]

Verdict — Sufficiency of evidence to support.

Where the verdict of a jury is not supported by the evidence in the case it should be set aside by the court.[2]

This suit was brought by Rucks & Jayne, attorneys, against A. and Jacob Barnett for legal services. Rucks died and the suit was revived in the name of J. M. Jayne, the survivor. An item-

1

Objections to reading stenographer's report containing a portion of the testimony of defendant given on a former trial, the defendant voluntarily testifying as a witness in his own behalf, on the grounds that the stenographer's report of the testimony was not duly authenticated, cannot be raised for the first time in the Supreme Court. Mackmasters *v.* State, 83 Miss. 1.

The objection that an affidavit in replevin was not duly sworn to will not be considered when made for the first time in the Supreme Court. Matthews *v.* Cotton, 83 Miss. 472.

Unless objection be made in the trial court to the proof of the contents of a writing by parol evidence, complaint thereof in the Supreme Court will be unavailing. Wagner *v.* Ellis, 85 Miss. 422.

The Supreme Court will not notice requests for instructions unless exception be duly taken to the action of the court below on them. Barney v. Scherling, 40 Miss. 320.

Objection not raised in the court below will be reluctantly noticed here; and this rule was applied where an objection was made here to the certificate of a deed read in evidence without objection. Hundley *v.* Buckner, 6 S. & M. 70.

And so, where the objection of champerty was made here to a deed, the objection on the court below being that there was no proof of its execution. Sessions *v.* Reynolds, 7 S. & M. 130.

And it was also applied where both parties in the court below showed by their instructions that they took the same view of what the evidence established, this court holding that that deed must be considered as a correct one. Coulter *v.* Robertson, 14 S. & M. 18.

After a verdict sustained by the evidence it is too late to object to instructions. Heirn *v.* McCaughan, 32 Miss. 17.

The court will not entertain questions not made below. Anderson *v.* Leland, 48 Miss. 253; Griswold *v.* Simmons, 50 Miss. 137.

Same rule applies to bill of particulars. Tierny *v.* Duffy, 59 Miss. 364.

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ized account was filed with plaintiff's declaration and the only items in controversy were one for $400 for legal services in relation to some land that belonged to A. Barnett and a charge of $5 for drawing up an agreement.

The testimony showed that A. Barnett owed H. & C. Newman and executed a deed of trust in their favor on some lands belonging to him. Default was made and the deed of trust was foreclosed and the land purchased by H. & C. Newman. On this title H. & C. Newman brought an action of ejectment against A. Barnett in the United States Circuit Court at Oxford and A. Barnett employed Rucks & Jayne to defend this suit and to file a bill in the Chancery Court to set aside the sale under the deed of trust.

Competency of jurors. Rolls *v.* State, 52 Miss. 391.

Competency of witnesses. McGehee *v.* Martin, 53 Miss. 319; Richardson *v.* Foster, 73 Miss. 12.

Verdict. McNairy *v.* Gathings, 57 Miss. 215.

Report of commissioners to compute a sum due. Ricks *v.* Hilliard, 45 Miss. 359.

Where the record shows errors in instructions properly excepted to and also presented by the assignment of errors, this court will decide the questions, even though not specifically urged either in this court or the court below. Ryan *v.* Railroad Co., 62 Miss. 162.

The giving of instructions cannot be assigned for error, unless objected to when the instructions were given, or in a motion for a new trial. Temple *v.* Hammock, 52 Miss. 360; Nelson *v.* State, 61 Miss. 212.

In capital cases instructions will not be considered unless excepted to when given or made grounds of objection on a motion for a new trial. Green *v.* State, 59 Miss. 501.

Objections to instructions should be made when the instructions are presented. Railway Co. *v.* West, 66 Miss. 310.

2

Verdict of jury will not be allowed to stand where the evidence is manifestly insufficient. Harris *v.* State, 71 Miss. 462.

Verdict will be set aside on the facts alone if they fail to sustain it. Monroe *v.* State, 71 Miss. 196.

A verdict supported by evidence will not be disturbed although a finding for the opposite party would have been more satisfactory to the court. Railway Co. *v.* Cantrell, 70 Miss. 329; Railroad Co. *v.* Williams, 67 Miss. 18.

Verdict sustained unless clearly wrong. McAlexander *v.* Puryear, 48 Miss. 420.

Must be against the clear weight of evidence, or will not be disturbed. Buckingham *v.* Walker, 48 Miss. 609; Railroad *v.* Mason, 51 Miss. 234.

Applies to the decision of the judge where jury is waived. Railroad *v.* Bolding, 69 Miss. 255; Dixon *v.* Cook, 47 Miss. 220; Walker *v.* Walker, 67 Miss. 529.

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J. M. Jayne, plaintiff, testified that he was employed by A. Barnett to defend the ejectment suit at Oxford and that he also filed the bill in chancery to set aside the sale under the deed of trust for A. Barnett against H. & C. Newman; that the cases were compromised and the land was bought by J. Barnett for which $400 was charged; that at the instance of A. Barnett he drew a private agreement between himself and J. Barnett; that J. Barnett also mentioned the case to him after the compromise was effected.

There was nothing in the evidence to show that A. & J. Barnett were partners, and they were not sued as such but as though jointly and severally liable. Defendants filed separate pleas.

From a verdict and judgment against both of the defendants Jacob Barnett appealed.

APPEALED from Circuit Court of First District, Sunflower county.

Reversed and remanded, October 19, 1885.

Attorneys for appellant, Nugent & McWillie.

Attorneys for appellee, F. Johnson and J. R. Yerger.

Brief of Nugent & McWillie:

The appellant and his brother, A. Barnett, were sued in one action for the amount of a bill for legal services made out against them conjointly as "A. & J. Barnett." They defended separately, the record showing that they were not partners, and were not sued as such.

The testimony in reference to the account discloses the fact that the debit items against each of the brothers with which the other had no sort of connection are included in the joint accounts sued on. The Levy suit and some other matters which related alone to the appellant's property and business, and for which he has paid, are embraced in the account, together with a fee of $400 for legal services in relation to the land of his brother A. Barnett, and the contest in the court below turned upon the question of whether or not appellant was liable for that $400, for if he was not, he owed the plaintiff nothing.

We can see no reason to say that he is so liable unless his mere

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family relationship to A. Barnett is sufficient to bind him. The facts touching that charge were as follows: A. Barnett was indebted to H. & C. Newman, and executed a deed of trust in their favor on his lands in Sunflower county, and a breach of condition occurring, the property was sold by the trustee, and bought in by the beneficiaries. On the title thus acquired, H. & C. Newman brought an action of ejectment in the United States Circuit Court at Oxford, and pending that litigation, A. Barnett filed a bill in the Chancery Court of Sunflower county to set aside the sale under the deed of trust. The dispute between A. Barnett and H. & C. Newman was compromised and adjusted in some way, and the appellant bought the property from H. & C. Newman, giving them a deed of trust on it for $4,300 of unpaid purchase money. The appellee was not employed by the appellant and had no contract with him touching the fee for legal services rendered in and about his brother's business or property. It is true that a half section of land in which the appellant had an undivided half interest was by mistake included by A. Barnett along with his land in the deed of trust to H. & C. Newman, and that the appellant may have asked appellee to look after that for him, and that the appellee may have done so, but we are unable to see by what right he can be held bound on a lumping charge, including services rendered to A. Barnett, on an employment by A. Barnett, and relating solely to his property and business. The appellant was not a party to or interested in A. Barnett's bill in equity attacking the sale under the deed of trust, and presumably the bulk of the $400 charge is on that account, for the services at Oxford were confined to the mere filing of pleas in an action of ejectment.

Neither did the appellant have any connection with the written memorandum drawn up for A. Barnett, and which was never signed or acknowledged, or used in any way. It was drawn up for A. Barnett in the absence of appellant, and appellant had never heard of it until the trial, and yet it is said to be included in the $400 charge for which it is sought to hold him liable. For the reasons apparent from this presentation of the evidence, we say that the verdict of the jury was manifestly wrong on the facts of the case, and a new trial should have been granted.

It is quite clear that there was no joint contract on which the appellant and his brother were liable to the appellee, if indeed the appellee was liable to him at all; for it is fair on all the

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evidence to say that the $100 paid him by appellant more than covered all his indebtedness. The appellee in his first plea of non-assumpsit denies that he was bound, either alone, or jointly, or jointly and severally.

In his second plea, he set out what items of account he was properly chargeable with, and that he had paid the same, and the demurrer thereto, which was sustained, should, if the plea was technically incorrect, have been extended back to the first defect in the pleadings, the facts being admitted by the demurrer. This defect is found in the declaration which proceeds on the erroneous idea that the defendants were jointly and severally liable for all services rendered to either of them. It does not clearly appear that the appellee was employed by this appellant in the Oxford suit at all, but admitting that he was, we are at a loss to discover how the employment to look after his right to an undivided interest in a part of the land included by mistake in his brother's trust deed can make him jointly liable with his brother for charges on account of matters relating entirely to the affairs of the latter, and with which he had nothing to do. His brother was resisting the ejectment suit on other grounds, to protect a different interest, and in the equity suit attacked the sale under trust deed for his own benefit and without making appellant a party.

The appellant had no interest that involved a resort to equity, and he did not resort to it. He never heard of the writing that appellee drew up for A. Barnett in regard to the land, and which was never put to any use. He was only interested in the Oxford suit, and that to a very limited degree and in a different way affording easy protection, and yet without a contract with him it is sought to hold him jointly liable with his brother for the fees charged in all of the above.

The first instruction given for the plaintiff, which is in no wise qualified by the second, was too broad and was calculated to mislead the jury. They might fairly deduce from it that if appellant had any interest in any of the land involved in the ejectment suit, he was jointly liable with his brother for all of the $400 charge covering all the matters above set forth. They must have so interpreted the instruction, for the facts afford no basis for their verdict save in this view of the law applicable to them. That such view is erroneous goes without saying.

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Brief of F. Johnston and J. R. Yerger:

This is a suit upon an open account, filed with the declaration, for legal services alleged to be due by defendants to Rucks & Jayne, attorneys, but now being prosecuted by J. M. Jayne, as surviving partner. The account is for $530, on which several sums amounting to $125 are admitted to have been paid.

The controversy in the case is with reference to two items, in the account set forth as follows:

"Oct. 30th, to filing plea in U. S. Court in case of Newman and Barnett, and filing bill in Sunflower county and attending to same, April, 1882 — $400.

"June 21, to tending transfer of judgment of A. Barnett *v.* C. H. Leod to J. Barnett — $45.

Each defendant filed a separate plea or pleas. The jury rendered their verdict for $405, the amount of the litigated items, at the April term, 1885.

There are two points in the case:

1. Is the sum charged due by contract, or reasonable for the services.

2. Is the defendant J. Barnett properly held liable for the debt.

The two defendants, A. Barnett and J. Barnett, are not sued as partners by that name, but they are sued as though jointly or severally owing the debt.

Only one of the defendants, J. Barnett, opposed, and it will only be necessary to look at his pleadings and the evidence as fixing a liability upon him.

As to the pleadings (see p. 7), the first plea is substantially the general issue, coupled with a special denial of any joint or several liability.

The second plea was in effect a plea of partial payment, technically incorrectly pleaded, all the defense implied in the case before the court and offered in the general issue. The second plea was demurred to, and demurrer sustained. It will scarcely be relied upon as of any effect in this appeal.

As to the amount of the fee charged, that will not be disturbed; a jury fixed it and that is proof of its reasonableness. This only brings this matter to the true material point. Is J. Barnett liable to pay the $400 set out in the open account. We wish the court to recognize the status of this question. It was purely a matter of

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fact, a thing within the cognizance of a jury, and therein, beyond doubt, evidence to sustain the verdict. All the evidence as to the liability went before the jury and in proper shape, but if this court deems it proper to critically review the same, it will be found commencing on page 23 of the record. Jayne establishes the fact that the suit was one against both A. & J. Barnett, and that A. Barnett employed him for both, and he acted for both, and finally prepared the transfer papers by which the substantial fruits of the law suit became vested in J. Barnett. Jayne's evidence and that of the two defendants was all the evidence in the case.

It is evident from the verdict that the jury believed that the sums charged — $400 and $45 for the items of legal service for which they were charged — was a proper fee, and second, that *both* the defendants received the benefit of the services. Regardless of any view which the court might entertain as individuals, of the propriety of the charge or the evidence fixing the liability on both defendants, it will not be a court to disturb the verdict on appeal.

OPINION.— CAMPBELL, J.:

There was no objection in the court below to the instructions, and, therefore, that made here for the first time cannot prevail.

The verdict is manifestly wrong, as to the appellant, and should have been set aside. By the testimony of the appellee himself, he had no claim on the appellant for the $400 item of the account, or the $5 item. A. Barnett, and not the appellant, employed Rucks & Jayne to defend the suit at Oxford and to bring the chancery suit in Sunflower, and to draw the agreement for which the sum of $5 was charged. Mr. Jayne says, that after the compromise of the suit, J. Barnett mentioned them to him, but that was after the services were rendered.

Reversed and remanded.

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ELLEN WEAVER *v.* A. E. NORWOOD et al.

Bill in Chancery — Equitable and Legal Rights.

Where equities are equal a legal right will prevail.[1]

Bill in Chancery by Appellant, Mrs. Weaver, against Appellees.

From a decree dismissing her bill complainant appeals. Affirmed.

The opinion of the court contains a statement of the facts.

APPEALED from Chancery Court, Clay county, S. EVANS, Chancellor, sitting by interchange with Hon. F. A. Critz, who was incompetent by reason of having been of counsel in said cause.

Affirmed, June 1, 1885.

Attorneys for appellant, Houston & Reynolds.

Attorneys for appellee, Fred & F. M. Beall, and R. Davis.

Brief of Houston & Reynolds:

* * * * * * * * * * * *

It is held by the chancellor that the purchase by DeVan and the conveyance to Mrs. Weaver are evidence of the fraudulent scheme on the part of Weaver to get possession of the land.

We concede that these facts show that Weaver or his wife was in fact the purchaser at the sale, and that for the administrator to purchase directly or indirectly is a fraud which avoids the sale at the suit of the heirs. But this court holds that if this purchase was made by Weaver that appellant is entitled to be substituted to the claims of those creditors who have been paid by Weaver.

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Where the equities of the complainant and defendant are equal, a court of chancery will not interfere. Lee *v.* Montgomery, 1 Walk. 109.

But in such cases will leave the parties to their remedies thereby. McAfee *v.* Lynch, 4 C. 257.

In such cases, however, if one party have also the legal title, and the circumstances be such that a court of equity may take cognizance of it, then the legal title will prevail. Coleman *v.* Rives, 2 C. 634; Hogan *v.* Burnett, 32 Miss. 617; Perkins *v.* Swank, 43 Miss. 349.

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Appellees in this case have introduced the statement of Mrs. Weaver that she paid DeVan $10,000 for the land, and the statement of DeVan that he paid Weaver out of his own money for the land, and that he was the owner, and that Weaver had no interest in the purchase. This establishes what the conveyances on their face show, and if so, then DeVan and Mrs. Weaver are *bona fide* purchasers and are not tainted with any of the pretended frauds of Weaver, and can charge the land with the purchase money if applied to the discharge of debts. * * *.

If appellant is entitled to relief, are appellees entitled to rent from January 1, 1864?

We concede that they are for the time appellant had possession of the property, unless they are concluded by the judgment in the ejectment suit, and that they are so concluded we think can be shown beyond question.

The declaration in ejectment demands rent from the 17th of November, 1866, date of sale by administrator to institution of suit. * * *.

In Gains *v.* Kennedy, 53 Miss. 103–107, it is decided that the judgment in the ejectment suit is a bar to improvements and rents. The judgment covers not only what was proved in the first suit, but all that might have been established, and if the plaintiff omits to prove the value of the rents when he has sued for them, or if the defendant fails to prove the value of the improvements, they are each estopped by the judgment.

The declaration in the ejectment suit shows that rent from the 17th of November, 1866, was demanded, and if plaintiffs failed to prove for them, as they did not fail, but went into a full investigation, they will be estopped by the judgment.

Suppose plaintiffs were to sue now for the recovery of rents, there can be no question that the judgment in the ejectment suit would be a bar. If a bar to such an action, it is a bar in this suit. * * *

The value of the improvement was shown to be more than $7,500, and that without any improvement the land would have rented for nothing. The rent is not proven to be more than $1,200 a year by any witness. The proper estimate is $800. It cannot be supposed that the jury satisfied $7,500 of improvements with $1,600 or $2,400 of rent.

Defendant in the ejectment suit, appellant here, is estopped

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to claim in this suit the value of improvements. The estoppel should be mutual, and if appellant is barred by the judgment in ejectment, as to the value of improvements, so should appellee be as to the amount of rent. * * *

Appellant is entitled to interest on the amount of the price of the land, which was applied to the payment of debts. This is settled and will not be controverted.

We are also entitled to the amount of taxes paid, unless this was included in the ejectment suit.

Brief of Fred & F. M. Beall:

We think the opinion of the Supreme Court in this case, 59 Miss. 665, has been misconstrued by counsel for appellant. * * *

It will be borne in the mind of the court that Mrs. Weaver was never a creditor of the estate of Joel Evans, but is the vendee of the purchaser at a void administrator's sale, and she does not occupy the attitude that Grant did in Grant *v.* Loyd, 12 S. & M. 191, or Drane in Silvey *v.* Simmons, 57 Miss. 712.

These two cases are clearly distinguishable from the one at bar. There was no fraud whatever in the inception of the claim of Grant against W. L. Loyd, the deceased. He had a valid, just claim against the estate, and so it was with Drane; he was a valid and just creditor of the estate of Simmons, and when this court came to pass on each of these cases, they set aside all acts down to where the fraud began. * * *

It is evident that as a creditor Mrs. Weaver has no rights, for she is not and never was a creditor; so we repeat, this case is clearly distinguishable from Grant *v.* Loyd, and Silvey *v.* Simmons, and her case is to be decided by the rule declared in the following cases decided by this court: Short *v.* Porter, 44 Miss. 533; McGee *v.* Wallis, 57 Miss. 638; three cases in 53 Miss. 94 to 119. * * *

All these cases, and especially Cole *v.* Johnson, Gains *v.* Kennedy, and Hill *v.* Billingsley, 53 Miss. 94 to 119, and McGee *v.* Wallis, 57 Miss. 638, place the right to recover on the "*good faith* of the *purchaser*" that he "*genuinely paid* his money *honestly* beleiving that he was getting a title to the land."

Chief Justice George, speaking for the court in McGee *v.* Wallis, on page 644, says: "The good faith must exist as a pre-

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requisite to the right of the purchaser to demand compensation for improvements, and a restitution for the purchase money. * * *

As a matter of fact, she paid nothing at all. The only claim being that she stands in the shoes of her husband by virtue of the fact, that he made a deed to DeVan and DeVan made a deed to her. "The sale is to be treated just as if the purchase had been made by Weaver himself in his own name." Weaver *v.* Norwood, 59 Miss. 676. * * *

In a word, all the fraudulent conduct of Weaver is chargeable to her in this suit, as if she had been the actual participant, and his fraud is so glaring, that it is unnecessary to refer to facts and circumstances which evidence it. * * *

Simmon *v.* Brady, 56 Miss. 10, decides that a *bona fide* purchaser of a *mala fide* vendee at an administrator's sale will be protected. That is, if Mrs. Weaver was an innocent purchaser, then no infirmities in the title of DeVan or Weaver would vitiate her title. * * *

If she was not a purchaser for value, and in good faith, in no event could she be entitled to recover for improvements. Cole *v.* Johnson, 53 Miss. 95. * * *

But suppose it is true that they did say that while they could not recover for rents during the coverture of Mrs. Weaver, yet they could offset the rents against any improvements made; the proof shows that the rents far exceed the value of the improvements; the rents were worth for the thirteen years at least $13,000, and the proof shows the place to have been in no better condition when appellees recovered possession, than when Weaver took possession. It will not be forgotten that the place rented in 1866 for $1,600. * * *

Additional brief of Fred & F. M. Beall:

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The verdict of the jury was for the plaintiffs in that suit, and it was, therefore, settled and adjudicated in that case:

1. That the sale by Weaver, administrator, to DeVan, was not in good faith.

2. That Mrs. Weaver was not a purchaser in good faith, but that her so-called purchase was but the consummation of a fraudulent scheme by Weaver to get possession of the land.

3. That Mrs. Weaver was not a purchaser for valuable consideration.

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On page 676 in 59 Miss., this court say: "We think it is also shown that the sale to DeVan was not a real sale, nor he a *bona fide* purchaser, but that he bought at the instance of and as the agent of the administrator, and that the sale ought to be treated as if the purchase had been made by Weaver himself in his own name." * * *
* * *

She, without having paid anything whatever, claims to be the owner of the claims, not of Weaver, but of Eckford & Weaver and Weaver, Starke & Co. firm assets, and seeks to have the land sold for her benefit, not for the benefit of Weaver or his creditors, nor for the benefit of Eckford & Weaver or Weaver, Starke & Co. or their creditors, but for her own benefit. By this she would be enabled to divert from the proper channel the assets of Eckford & Weaver, an insolvent firm, and in the consummation of the fraud upon the just creditors of Evans, also perpetrate a fraud upon the creditors of Eckford & Weaver.

The rights of the parties are to be considered, "now as they would be if the sale had never been made." 59 Miss. 680. * * *

R. Davis for appellees submitted a brief on the facts of the case.

OPINION.— COOPER, C. J., delivered the opinion of the court.

In 1866, the husband of appellant, at a sale made by himself as administrator of the estate of Evans, became the purchaser of the lands belonging to his intestate, taking title in the name of a third person who soon thereafter conveyed the land to the appellant. Weaver, the administrator, negotiated all the transactions, and was, as we have heretofore decided, the real owner of the property, taking title for purposes of his own in the manner indicated. Payment of the purchase money bid for the land at the sale was made by crediting the same as a payment on certain claims which two firms of which he was a member held against the estate of Evans. The amount of the bid was about $6,000.

Weaver, the administrator, and his wife, the appellant, remained in possession of these lands until 1876, when the heirs of Evans instituted an action of ejectment to recover the lands, and the mesne profits from the beginning of the year 1867. Weaver died in 1878, and the action was dismissed as to him, and in 1881

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a judgment was rendered against the appellant in favor of the plaintiffs in said action.

In that suit, Weaver and wife, as a set-off to the rents demanded, filed their account for permanent and valuable improvements to the amount of some $8,000. The verdict of the jury was that the plaintiffs should recover the land and the sum of $750 for the rents of 1881.

Having been evicted from the land, the complainants exhibited this bill, praying that she might be substituted to the rights of the creditors whose debts against the estate were extinguished by the sale of the land.

It appears from the bill and the evidence in the cause that, by reason of depreciation in the value of the property, the land is now worth less than the sum at which it was sold; and several thousand dollars less than the fair rental value of it for the term for which it was held by Weaver under the probate sale. It will thus be seen that the rents of the property from 1867 to 1880, which far exceeded in amount the purchase price paid by Weaver, and to which the heirs-at-law of Evans were entitled, have been by Weaver's action invested in improving the property, which is now worth less than the sum expended.

The heirs have the land, worth less in its improved condition than their money, and against it Mrs. Weaver asserts a right to fix a charge for the debt of their ancestor. It is only by an appeal to equity that the complainant can establish any claim to the property. First, because she is not a creditor of the estate except by substitution in equity, and, secondly, that the debts to which she seeks substitution are long since barred by limitation, unless kept alive as an equitable charge on the lands. In this condition of things, she is not entitled to relief, for the land, if converted into money, would realize a sum less than the rents to which the heirs are entitled, and their equitable rights to their rents are as strong as hers to her debt. The equities being equal, a court of chancery will not lend its aid to defeat the legal advantage possessed by the heirs.

Affirmed.

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NELSON SMITH et al. *v.* W. H. SHELTON.

Trust Deeds — Effect of Foreclosure Sale on Junior Mortgagee.

A foreclosure sale under a prior trust deed cuts off any rights or interest depending upon a junior trust deed.[1]

Same — Rights of Purchaser of Personalty.

Personal property sold in satisfaction of a prior trust deed cannot be followed into the hands of the purchaser's vendee by the holders of a junior trust deed.

Suit in replevin by W. H. Shelton against Nelson Smith. From a judgment of a justice of the peace dismissing his suit Shelton appeals to the Circuit Court where he obtained a judgment from which judgment Smith appeals. The facts briefly stated are as follows:

Henry Watson, the original owner of the mule for which the suit was brought, executed a deed of trust on the mule to Ira A. Cartwright. Afterward he executed another deed of trust in favor of Harsh & Company with W. H. Shelton as trustee. The trustee in the first deed of trust took possession of the mule and sold it under the trust deed and Cartwright became the purchaser. Watson then sued Cartwright in replevin for the mule, and Cartwright gave bond with Goodman as his surety, and kept the mule. Pending the suit, he sold it to Smith. At the time of the

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Whether fraudulent in whole or in part, it could in no legal way have deterred bidders, for the reason that the purchaser under a senior mortgage sale takes to the exclusion of all junior incumbrances. Weir *v.* Jones, 84 Miss. 602.

Where the vendee of land, to secure the price, executes a mortgage thereon, a purchaser under foreclosure thereof will prevail as against any subsequent claim or charge imposed by the mortgagor. Bainbridge *v.* Woodburn, 52 Miss. 95.

The vendee of a trustee in a mortgage with power of sale will get the title as it stood when the mortgage was executed, unaffected by any subsequent incumbrances or liens. Brown *v.* Bartee, 10 S. & M. 268.

A trustee in a mortgage with power of sale, on default in the payment of the debt, may execute the power without the intervention of a court of equity, and a sale by him, made in accordance with the terms of the mortgage, is a perfect foreclosure, and a bar to the equity of redemption. Sims *v.* Hundly, 2 How. 896.

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commencement of the suit the debt secured by the trust deed to Harsh & Company had not become due. The trial resulted in a judgment in favor of Watson for the possession of the mule, and Shelton, trustee in the second trust deed, then sued Smith in replevin. The mule in the meantime was killed by a railroad train before the return day of the writ. When the case reached the Circuit Court Shelton offered in evidence over objections a judgment obtained in the Circuit Court in a case entitled "Henry Watson *v.* I. A. & Chester Cartwright" wherein the plaintiff obtained judgment for the mule, and court here found in favor of the plaintiff Shelton, and gave judgment for the value of the mule. From this judgment this appeal was prosecuted.

APPEALED from Circuit Court, Sharkey county, RALPH NORTH, Judge.

Reversed and remanded, November 2, 1885.

Attorneys for appellant, Miller, Smith & Hirsch.

Attorneys for appellee, S. M. Shelton.

Brief of Miller, Smith & Hirsch:

It is inconceivable to us upon what idea the court proceeded in rendering judgment against the defendant, for it having been agreed that the mule was sold under Cartwright's prior deed of trust, the necessary inevitable effect was to cut off and destroy completely any right or interest depending upon a junior deed from the same quarter. The validity of the prior trust deed and the sale under it so far from being disputed was expressly admitted.

Who will deny that a sale under a trust deed has the same effect precisely as a sale under a decree of foreclosure upon a mortgage? or that such effect is not to destroy the interests depending upon subsequent incumbrances?

The court seems to have disregarded this idea and to have held that notwithstanding the foreclosure and sale under the prior deed the trustee in the second could still maintain a *personam* action for the property.

It is no reply to say that Henry Watson obtained a judgment for one mule or its value against I. A. & Chester Cartwright in 1884.

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In the first place, there is no pretense of evidence that the mule involved in the two suits was the same. * * *

Can Shelton say: Because my grantor Watson has obtained judgment against Cartwright, which may or may not have been satisfied as between them, therefore, I, as trustee in a junior deed of trust made by him, can maintain replevin against Cartwright's vendee? That this is a case of priority in law? Manifestly not, because in the first place his title was gone forever by reason of the sale under the prior deed. Second, because there can be no priority in a legal sense without the element of *neutrality*. A person who relies upon a judgment under this doctrine must be so situated that had the judgment been the other way *he* must have been bound equally. This is elementary. * * *

There is another ground absolutely fatal to the judgment, and that is the want of evidence that any indebtedness was due from Watson to Harsh & Company, when this suit was brought. * * *

Brief of S. M. Shelton:

Both Shelton and Smith were privities by purchase from the parties to that suit. Smith bought of Cartwright pending the suit; Shelton held under the deed from Watts. This was not a judgment *in personam* against Cartwright, but a judgment establishing Watts' right of possession, and the wrongful detention of the property on the part of Cartwright. It settled that the title of Cartwright under the trust sale was a nullity. It could not be opened and inquired into by Smith like a judgment *in personam* might be. Freeman on Judgments, § 165.

COOPER, C. J., delivered the opinion of the court:

We are led to believe that the record does not present this case as it was tried in the court below. The parties here have made admission as to certain matters of fact which were there proved but which do not appear in the bill of exceptions.

But aiding the record by the admissions made, the facts do not show a right in the plaintiff to recover. It appears that at some time not stated, one Watson, who executed the deed of trust under which the plaintiff claims, instituted a suit in replevin against Cartwright and in November, 1884, recovered a judgment against him for the possession of the mule in controversy. In March, 1882 (but whether this was before or after the commencement of the

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above-named suit of Smith *v.* Cartwright is not shown), Cartwright bought the mule at a sale made by the trustee in a deed of trust executed by Watson, antedating the one under which Shelton claims. After this, he sold the mule to Smith.

It may be said that the title which Cartwright had when he sold to Smith was not involved in the suit of Watson *v.* Cartwright, for it may be that only the right of present possession was therein involved.

The judgment is reversed and the cause remanded.

E. WHITINGTON *v.* JAMES WATKINS.

Replevin — Precedent Demand.

A previous demand of possession of personal property is not necessary in order to maintain replevin whether the original taking be tortious or not; the writ being a sufficient demand and defending the suit a refusal to deliver possession.[1]

Same — Parol Sale of Personal Property with Reservation of Title.

Where plaintiff sells property by parol sale reserving title to secure the purchase money he may bring replevin to recover the property from an innocent purchaser for value, after default.

Replevin by appellee, Watkins, to recover possession of one mule, against appellant, Whitington. From verdict and judgment for plaintiff defendant appeals. Affirmed.

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One lawfully in possession of personal property having a charge upon it is entitled to a demand by the owner before the latter can maintain replevin, but if, when sued, he stands his ground and contests the right of property in the plaintiff, he cannot afterward change his position and rely upon the want of demand, or other preliminary steps, as a defense. George *v.* Hewlett, 70 Miss. 1.

Where property is sold on credit, title passes by delivery, and although the terms be not complied with, the seller cannot maintain replevin against one who has brought from the purchaser. Bank *v.* Carriage Co., 75 Miss. 587.

Where defendant in replevin sets up title in himself, it is unnecessary for plaintiff to make demand for the property before suing. Dearing *v.* Ford, 13 S. & M. 269; Newell *v.* Newell, 34 Miss. 385.

Under an agreement for the purchase of an entire cotton crop to be paid for as delivered, though a part is received and paid for, the title to that not delivered does not pass, and the person contracting the purchase cannot

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Statement of the Case.

The evidence for plaintiff was in substance that plaintiff sold one John Strickland a horse on credit in 1880 and retained title to him until paid for and a short time afterward traded Strickland a mule for the horse, Strickland agreeing to give $50 difference, and that plaintiff retained title in the mule until the purchase money was paid, and that defendant traded with Strickland for the horse in 1883, and that none of the purchase money had ever been paid.

John Strickland testified for defendant that there was no reservation of title by plaintiff to either the horse or the mule but that the sale was an absolute sale on credit without any agreement of title being reserved by plaintiff. That he traded the mule to defendant in August, 1883, and plaintiff never complained until in the fall when witness was about to move off of plaintiff's place.

Defendant testified that he traded with John Strickland for the mule on the 15th day of August, 1883. He was then asked "Did Mr. Strickland claim to be the owner of the mule he traded you?" Plaintiff's objection to this question was sustained and defendant excepted; that no demand was ever made on him for the mule before suit was brought.

The court refused the following instruction asked by defendant:

"The court instructs the jury that in this class of cases, where the owner is reclaiming his property sold to another upon a condition precedent, that a suit for its possession is not such a demand as is explained in these instructions, and if they believe this is the only demand made upon defendant they will find for defendant."

The court gave the following instruction for defendant:

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maintain replevin against a third person who subsequently purchases it. Berry *v.* Waterman, 71 Miss. 497.

A verbal contract for the sale of growing timber though valid as to trees cut and paid for after execution of contract is void as to trees standing on the land, though all the purchase money is paid, and if these are removed over the owner's objection he may maintain replevin for the timber into which they are converted. Nelson *v.* Lawson, 71 Miss. 819.

Where personal property is sold partially on credit, and the vendor reserves title, as security for the payment of the balance of the purchase money, the property may be recovered even from one who purchased it from the vendee without notice of the seller's right and although the contract is not recorded. Ketchum *v.* Brennan, 53 Miss. 596; Duke *v.* Shackleford, 56 Miss. 552; Dederick *v.* Wolfe, 68 Miss. 500; Tufts *v.* Stone, 70 Miss. 54; Journey *v.* Priestley, 70 Miss. 584.

Defendant may show failure of consideration. 74 Miss. 119.

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"Before the plaintiff can recover the mule in this case, he must prove by a preponderance of the testimony that at the time he sold the horse to Strickland he reserved title until full payment of the price."

Second. That at the time of the exchange of the mule in controversy it was agreed by both parties that the title to the mule was to remain in plaintiff until full payment of the price. Third. That the purchase money of the horse and the $50 difference in the exchange has never been paid. Fourth. That the condition of said sale has not been waived by plaintiff. Fifth. That plaintiff has done nothing or allowed Strickland to do anything that would mislead defendant into purchasing said mule.

Defendant made a motion for a new trial which was overruled and he appeals.

APPEALED from First District, Leake county, Circuit Court.

Affirmed October 26, 1885.

Attorney for appellant, O. A. Luckett, Jr.

Attorney for appellee, J. H. Reagan.

Brief of O. A. Luckett, Jr.:

We respectfully submit the following points for the reversal of this case:

First. The court erred in sustaining the abjection of appellee to the question propounded to appellant. (See record, pp. 24, 25.)

It was proper to be submitted to the jury and to be considered by them in determining the good faith of appellee in the purchase of the mule, and also as a circumstance going to show lax and negligence on the part of appellee in allowing Strickland, the conditional vendee, to remain in possession of the mule, claiming it as his own, so long after condition broken, by means whereof appellant was mislead to his injury.

After condition broken, suffering the vendee to remain in possession of personal property an unreasonable length of time makes an absolute sale out of a conditional one, especially so if an innocent person has been entrapped and defrauded. Chitty, Contracts, pp. 343, 344, note 1; Kent, Com. 642; Long Sales, 189, 190;

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1 Parson Contracts, 449; Ketchum & Cummings *v.* Brennan, 53 Miss. 596.

A sale on condition that the property is not to become the property of the purchaser, unless the price is paid at a designated time, is valid as to the parties, and also as to strangers for a reasonable time after breach of the condition in case the purchaser has the property in his possession. Authorities above.

Second. The second instruction granted to appellee is erroneous and is contrary to the law as I conceive it to be from an examination of the books. The rule of the civil law has been adopted by the courts in this State. That is, the law appropriates credit most beneficially for the debtor. Harner *v.* Kirkwood, 25 Miss. 99; Poindexter *v.* La Roche, 7 S. & M. 50; 50 Miss. 175; Winder *v.* Kennedy, 52 Miss. 164; Ogden *v.* Harrison, 56 Miss. 743.

Being a purchaser from Strickland, appellant stands in his shoes, with the same right to demand the money paid by Strickland to appellee, appropriated most beneficially to Strickland, and how is that under the evidence in this case?

Strickland bought a horse from appellee in 1880 and about the same time made a parol contract for the purchase of some land from him, agreeing to pay for the land in installments. Appellee testified that Strickland agrees to pay rent for the land in event he failed to make payments of the purchase money as each installment fell due. Strickland denies this, and is corroborated by his son who was present, and heard the terms of contract of purchase. A strong circumstance going to support this theory is the further fact admitted by appellee that no amount of rent was agreed upon, nor that any was ever demanded from and paid by Strickland, although Strickland, in 1881, made large payments of money.

Under the Statute of Frauds and Perjuries, while Strickland could not enforce the contract to sell, or of sale, still there is no relation of landlord and tenant between them, viewing the case in the light of the preponderance of the testimony.

Upon the question of the agreement to pay rent for the premises, the preponderance of the testimony was with appellant, and that being the case, the supply and store accounts were not privileged debts, to be paid first. Under the facts of the case, it was most beneficial to Strickland to have the mule paid for first, because then it would be his property. Assuming that there was a reservation of

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title by appellee, this was as good if not better than taking a trust deed to secure its purchase price. It is settled in this State, beyond cavil, that where there are two debts, one a secured debt, and the other a simple debt, and the debtor makes payment of money without direction as to appropriation, then it shall be credited to the secured debt, regardless of the acts and wishes of the creditor, or the way in which he has placed the credit. 52 Miss. 157; 48 Miss. 205; 50 Miss. 177; 56 Miss. 743.

All the witnesses say that Strickland gave no directions as to how the proceeds of the cotton should be applied. The bookkeeper of appellee (and his witness) with whom the transactions took place says that neither Strickland nor appellee directed him how to apply the credits. (See record, p. 32.)

This instruction is erroneous for another reason. The question of whether Strickland agreed to pay appellee rent (and the decision of that question in the negative would have been fatal to appellee's theory) was altogether taken away from the consideration of the jury by the court, who by said second instruction decides upon the weight of testimony, on this point, which should have been left to the jury, such being a question of fact, and a very disputed one at that. This was wrong. Proffatt on Jury Trials, §§ 359, 360, 361, 368; Garnett *v.* Kirkman, 4 G. 389; Perry *v.* Clark, 5 H. —; Frizee *v.* White, 5 C. 198, and 48 Miss. 470.

In case of a controverted material fact, it is error to give an instruction to the jury which will in effect withdraw from them all discretion in passing on them. Thrasher *v.* Gillespie, 52 Miss. 840. Upon the theory of appellee that Strickland was his tenant in 1881, and that consequently he had an agricultural lien upon the crop for supplies, we say this, that there is no proof at all on the part of the appellee and upon him rested the burden of proof to show that the account of Strickland in 1881, even conceding he was a tenant, was for such articles as gave him a lien upon the crop.

There is nothing in the record, nor was there any proof offered by appellee in the court below, going to show that the account of Strickland in 1881 was made up of such items as created a lien upon his crop. So it was a matter of presumption or guess work to say that Strickland in 1881 owed appellee for plantation supplies equal to the amount of his payments for which appellee had a landlord's lien.

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Appellee and his bookkeeper both say that in 1881 Strickland had a store and supply account and that they applied the payment to those accounts without Strickland's knowledge or consent. How much was the store account? How much was the supply account?

These questions are all unanswered and unexplained by the testimony of the appellee, who best knew. To give him a right of appropriation to an account for supplies, he must prove such account in the right way, that is by the production of his books or by the testimony of the person who sold and delivered the goods, if within his knowledge. It was not certainly the duty of the appellant to prove a negative; that is, that Strickland had no supply account equal to the amount of his payments. Whenever a party insist upon an appropriation of payments different from what the person making the payments intended or wished, he must satisfy the court that he has a legal right to have such appropriation made in such a manner. Upon failure to make such proof, the credit will be applied in the way that would be most beneficial to the debtor as appears from the evidence in this case to paying for the mule.

Third. The sixth instruction granted appellee is erroneous and should not have been given. Demand for the restoration of the property or payment of its price is necessary to entitle appellee to maintain this suit. 56 Miss. 554; Story on Sales (2d ed.), 457; Fairchild *v.* Phelps, 22 Pick. 536; Ayers *v.* Bartlett, 7 Pick. 56; Smith *v.* Plower, 15 East. 607; Gordon *v.* Harper, 7 T. R. 9; Wheeler *v.* Train, 3 Pick. 258.

When a party is rightfully in possession of property belonging to another, he does not unlawfully detain it until after a demand by the true owner and a refusal. But if the taking is tortious, no demand is necessary. Gates *v.* Gates, 15 Mass. 311; Seaven *v.* Dougley, 4 Greenleaf, 306.

Replevin will lie in all cases where trespass *de bonis asportatis* will and the same facts that are necessary to support the one are required to support the other. In cases of sales on condition precedent, the absolute possession of the property is delivered to the purchaser, but the title is retained by the seller. The buyer is then rightfully in possession of the property and such possession commenced rightfully and by consent of the owner. When does this possession become wrongful? Not until after a breach of

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the condition of sale, and a demand made by the owner of the price or the restoration of the property. In order to put an end to the sale and repossess himself with the property, the seller must make a demand for the restoration of the property or payment of the price. Duke *v.* Shackleford, 56 Miss. 534; Ketchum & Cummings *v.* Brennan, 53 Miss. 596. In the above cases demand for the possession of the property was made before suit upon the *parties in possession,* they being purchasers under the conditional vendees.

Trespass *de bonis asportatis* nor replevin will lie where the taking is not tortious. Morgan, Vade Mecum, 70–72; Seldwyn's Nisi Prius, 1110; Gilbert, Replevin, 58; Com. Dig. Replevin (a); 1 Chitty 118; 1 Esp. 216; 7 Johns. (N. Y.) 141; 20 id. 467.

A wrongful detainer after a lawful taking is not equivalent to a wrongful original taking. Marshall *v.* Davis, 1 Wend. 109, 19 App. Div. 463. In the case at bar, appellant did not come into possession of the mule wrongfully or tortiously nor has he detained it wrongfully nor tortiously, because appellee has done nothing before the bringing of this suit to entitle himself to recover the mule for he has never demanded it from appellant.

Had he made a demand as the law required him to do in order to assert his right if he has any, appellant could have either given up the mule or refused to do so, in which event the suit of appellee would be free from this objection, which we think is fatal to the maintenance of it.

To recover property ordinarily in replevin, the bringing of the suit is a demand and defending it is a refusal; but in cases like the one at bar, this principle is not good nor applicable, because in the one case the owner is presumed to be in possession of his property, and consequently would be entitled to his writ, while in the other he must by certain acts put himself in position or situation to be entitled to the right of possession, which by his contract he had before parted with; and until he has this right of possession by making a demand for the restoration of the property or payment of its price, his remedy by replevin is in abeyance. Upon whom must the demand of the possession of the property be made? We think certainly upon the party in possession and against whom the suit is brought.

Fourth. The court erred in refusing to grant the fourth instruction for appellant (see Record, 15), because, as before stated, be-

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fore appellee could maintain a suit of this kind, and as a condition precedent, it was necessary for him to make a demand for the possession of the mule of appellant, and this he failed to do. In all cases of this character where the seller is endeavoring to recover property sold upon a condition precedent, I see that the seller in every one made demand for the property before institution of the suit, and this fact is mentioned by our court in cases of Ketchum & Cummings *v.* Brennan, 53 Miss. 596; and Shackleford *v.* Duke, 56 Miss. 554; and cases cited above.

The question of whether appellant ever made a demand for the property of appellant was taken altogether away from the consideration of the jury by the court in the sixth instruction for appellee.

They were told in plain language that it was unnecessary, and that appellee could recover without such demand. Such an instruction is in the very teeth of the authority, and counsel for appellee cannot sustain it by citation from authority.

Our fourth instruction embodied the law correctly and it should have been granted, and it was error to have refused it.

Fifth. The court erred also in refusing our fifth instruction. If the fourth was law, then the fifth was also.

Sixth. The court further erred in refusing our sixth instruction which we submit was the law of the case as viewed from the testimony. If Strickland made payment without direction as to show it should be placed, the law, *eo instanti,* placed it where it would be most beneficial to him, i. e., to the payment of the mule debt. Our reasons and authorities cited above in our argument showing the error of the court in granting the second and sixth instructions on behalf of appellee will apply with equal force to the error of the court in refusing our fourth and sixth instructions. They are diametrically opposed to each other, and if the one is law, the other is not.

Seventh. Finally, the court erred in not setting aside the verdict of the jury, and granting appellant a new trial. It was proven by Strickland (Record, 26), and not denied by appellee that it was understood and agreed between them that he was to pay for the horse with the first cotton. This horse was afterward exchanged by Strickland to appellee for a mule; Strickland agreeing to pay a difference of $50. This shows that it was the intention of the parties to this sale at the time, that the horse and afterward

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the mule was to be paid out of the proceeds of the crop. This was the first debt contracted, and should have been the first paid.

We respectfully submit the case and ask the court for a reversal of the judgment, and for a new trial on account of the errors mentioned above.

OPINION.— CAMPBELL, J.:

A precedent demand for the return of the mule was not necessary to maintain the action. Dearing *v.* Ford, 13 S. & M. 269.

The case was fairly submitted to the jury on proper instruction as to what the plaintiff was required to prove to entitle him to recover. The refusal to permit an answer to the question whether Strickland did not claim the mule as owner, when he disposed of it to appellant, was proper. It was immaterial whether he said he was owner or not. He dealt with it as owner, but the question is, was he the owner, as he assumed to be? And that was left to the jury on proper instructions.

Affirmed.

WINNIE O. DAVIS *v.* MARY T. GIBBS.

Summons by Publication — Unknown Parties — Tax Title.

Where in a proceeding to confirm a tax title to land "unknown parties" are made defendants, it is not necessary under section 1753 of the Code of 1871 for the court to make an order of publication in order to obtain jurisdiction.[1]

Adverse Possession — Enclosures.

Where title is claimed by adverse possession, part of the premises so claimed being enclosed and cultivated, and part unenclosed and uncultivated, held that title is not acquired as to the unenclosed portion.

The following is a part of section 1753, Code of 1871, the construction of which is involved in this case.

1

Adverse possession for ten years of a part of an adjoining tract though claimed under the mistaken belief that it was within the calls of his own deed gives title. Jones *v.* Gaddis, 67 Miss. 761.

Cultivation of a part of a tract and acts of ownership over the remaining unenclosed portion without hindrance for ten years gives title to all. Gathings & Watson *v.* Miller, 76 Miss. 651.

A defendant in ejectment who relies upon possession alone to succeed must show the possession to have been adverse, and to have been continued

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"Any person holding or claiming, under a tax title, lands heretofore or hereafter sold for taxes, when the period for redemption has expired, without redemption of the same, may proceed by bill in the Chancery Court of the county in which the land lies, to have such title confirmed and quieted, and shall set forth in his bill his claim under such tax sale, and the names and places of residence of all persons interested in the land, so far as known to complainant, or as he can ascertain by diligent inquiry; and where the names of persons in interest, or their places of residence are unknown, and have not been ascertained by diligent inquiry, the bill shall so state, and shall in all cases be sworn to; and where the names and places of residence of persons in interest shall be given, they shall be made parties defendant as in other cases in chancery; and where the bill shall show that the persons interested are unknown to complainant, and that he has made diligent inquiry for their names and could not obtain them, all persons interested may be made defendants by a notice addressed: 'To all persons having or claiming any legal or equitable interest in the following described land, sold for taxes on ——— day of ———, A. D. 18—, viz.: (describing land as described in the tax collector's conveyance,)' and the notice shall state the nature of the suit, and require the appearance of all such parties in interest on the return day, not to be less than two months from the date of the order of publication as aforesaid: * * *."

This was an action of ejectment brought by Mary T. Gibbs against Winnie O. Davis for the possession of certain real estate, and was instituted June 7, 1884. The plaintiff deraigned her title as follows: Tax collector's deed conveying the property to J. G. Gibbs, the husband of plaintiff, dated January 2, 1872, said land being sold for the taxes of the year 1871; a decree of the Chancery Court rendered July 21, 1875, quieting and con-

for ten years in order to ripen into a title according to the Statute of Limitations. Hicks *v.* Steigleman, 49 Miss. 377.

The essential elements which are necessary to constitute an effective adverse possession are a hostile, actual, open and notorious, exclusive and continuous occupancy for the statutory period. McCaughn *v.* Young, 85 Miss. 277.

Actual occupation, cultivation, and residence are unnecessary to constitute actual possession in the sense of being adverse to the true owner where

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Statement of the Case.

firming said tax title; a deed from J. G. Gibbs to plaintiff dated November 12, 1881.

The answer of defendant shows: That the assessment-roll for the year 1871 was not filed with the board of supervisors until October 4th, and that same was never approved or corrected by the board; that when the decree confirming was obtained, the proceedings were instituted against "unknown parties," and that no order of publication was made by the court or by the clerk citing the "unknown parties" to appear and defend the suit, though a publication was made, and by reason of such failure the defendant contends that said decree was void and could be attacked collaterally; that the defendant and the ancestor through whom she claimed the land had been in open, uninterrupted, and adverse possession of the land for more than ten years next before the beginning of this suit.

The evidence shows that part of the land in controversy was enclosed and in cultivation and part of it unenclosed. The case was submitted to the court who gave a judgment for the plaintiff for the unenclosed land, but allowed defendant to retain possession of the enclosed portion. From this judgment defendant appealed, assigning as error the action of the court in giving judgment against her for the unenclosed land. The plaintiff also prosecuted a cross-appeal assigning as error the action of the court in not rendering a judgment in her favor for all the land in question.

APPEALED from Circuit Court of Grenada county, A. T. ROANE, Judge.

Affirmed, February 22, 1886.

Attorneys for appellant, W. C. McLean.

Attorney for appellee, W. H. Fitzgerald.

the land is so situate as not to admit of permanent, useful improvement, and the continued claim of possession is evidenced by public acts of ownership. McCaughn *v.* Young, 85 Miss. 277.

A mere scrambling possession is not sufficient to support a defense of the Statute of Limitations, under Code 1892, §§ 2730, 2731, 2734, barring all suits for the possession of land where defendant or those under whom he claims have been in the actual adverse possession thereof for ten years before plaintiff's cause of action accrued. Mitchell *v.* Bond, 84 Miss. 72.

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Brief of W. C. McLean:

* * * * * * * * * * * *

The next question which the record presents is: "Did the proceedings under section 1753, Code of 1871, to quiet and confirm the tax title, validate and settle the title?"

Our position is, that the decree is void, that the record upon its face shows that the decree was void, and that it can be attacked collaterally. If the decree was merely erroneous, then of course we cannot assail it in this suit; but being from the inspection of the record a nullity, we can so assail it.

The proceeding to quiet and confirm the title was a proceeding against an *unknown* party. The bill of complaint states: "That the land was assessed to unknown owners; that the complainant does not know and cannot ascertain the names of the owners, though he has made diligent inquiry to do so, and prays that publication be made for unknown parties.

This bill was filed May 17, 1875, and the final decree made July 22, 1875. The reason we urge against the validity of the decree is that an *order of publication* was not made for the "*unknown* parties," and that not having acquired jurisdiction the whole proceedings were void.

This bill was filed under section 1753, Code of 1871, and this section provides that "where the bill shall show that the persons interested are unknown to complainant * * * all persons interested may be made defendants by a notice addressed to "all persons" * * * and the notice shall state the nature of the suit and require the appearance of all such parties in interest, on the return day, not to be less than two months from *the date of the order of publication* aforesaid. This section, together with sections 1069 and 1013, Code of 1871, prescribe the mode of making unknown parties defendants in chancery proceedings. The method is this: That when it is made to appear to the chancellor or clerk in vacation by affidavit or otherwise that the party is a nonresident, or an unknown party, such chancellor or clerk in vacation *shall make an order directing* such absent or unknown party to appear and plead, etc., at the return day of the court therein to be made not less than two months after the date of the order, which *order* shall be published for four weeks in sections 1069, 1013, Code of 1871. Thus we see that an *order of court* must be made before the court can acquire jurisdiction and the order must be published; in fact

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the jurisdiction over the person cannot be obtained until the order is published, and the court does not *even attempt* to acquire jurisdiction until the order is made. The record shows that no order of publication was made in this cause.

Did the failure to make the order make the whole proceeding void?

The decree was void — absolutely null because jurisdiction over the person was not obtained. That it is just as necessary for the court to have jurisdiction over the person as over the subject-matter, is a principle too well settled for debate. * * *

The rule is this: That whenever the court did not have jurisdiction of the subject-matter, or of the parties, and this want of jurisdiction is manifest from an inspection of the record, then the judment is void. Freeman on Judgments, § 116.

All the courts agree that such a judgment is an absolute nullity. A void judgment is no judgment in legal effect. By it no rights are diverted; no rights can be obtained; time will not improve it or cure its defects.

Does the decree under consideration come under this rule as laid down. * * * The *order of publication* was a *consideration precedent* to the court acquiring jurisdiction, and the whole record shows that such an order was never made. It is made by statute (Code of 1871), the duty of the clerk to keep a book in which the acts of the court and of the clerk in vacation are to be entered and the law will presume that if an order of publication was made that the court, or the clerk if made in vacation, performed the duty required by law and entered the order — but by introducing in evidence the minute-book, the book in which these minutes and orders were entered, and by law required to be kept, we prove by the record (not by parol) that such an order was not made; in other words the record *speaks for itself* and upon its face shows that jurisdiction was not obtained.

It is a well-settled rule that notice to unknown and nonresident parties by publication is an inferior mode of constructive service and a strict compliance with the statute in reference thereto is required. George's Miss. Digest, 637 (Process, 15); M. p. 901 (Chancery, 565, 566); M. p. 617, Probate Court, § 50, and authorities cited.

In Kerr *v.* Bevins, 1 S. & M. 584, this court held that when the statute required both publication in a newspaper and posting

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at the courthouse door, if the latter be omitted, a decree *pro confesso* was void. * * *

We have made an exhaustive research of the authorities to find an authority directly upon the point involved, and we find one "all fours" with the case at bar, and it holds that the decree is a nullity and may be attacked collaterally. We refer especially to Galpin *v.* Page, 18 Wall. (U. S.) 350–373, where this identical question is learnedly and exhaustively discussed and the conclusion reached that the failure to make the order of publication rendered the decree a nullity and that the same could be collaterally attacked. In the noted case of Pennoyer *v.* Neff, 95 U. S. 714 (in which a majority of the court held that a personal judgment rendered against a nonresident upon notice of publication was a nullity), Mr. Justice Hunt, in his dissenting opinion in referring to Galpin *v.* Page, *ubi supra,* says: "The case of Galpin *v.* Page, in 18 Wallace, is cited in hostility to the views I have expressed. In the case as reported it is held that the title to the purchaser under a decree against a nonresident was invalid for two reasons: there was no jurisdiction under the statute of California on account of an entire absence of an affidavit of nonresidence and of diligent inquiry for the residence of the debtor. And, second, the absence of an order of publication in Eaton's case; both of which are conditions precedent to the jurisdiction of the court to take any action on the subject." Pennoyer *v.* Neff, 95 U. S. 744, 745. * * *

This court, in Kerr *v.* Bowers, 1 S. & M. 588, in discussing this question, says that unless such compliance be shown affirmatively the proceedings will not be sustained. * * *

Freeman on Judgments, § 127, says: "A publication made in the absence of any law authorizing it is the same in legal effect as no publication. A judgment based upon it is void." Referring to 4 Pet. 466; 9 Kan. 390. The law which authorized the publication was the order, but there was no order; hence, in legal effect, no publication. * * *

We do contend that where the record shows that the defendant is a nonresident, or an unknown party, then the record must show that those steps were taken which was a condition precedent to the court acquiring jurisdiction. See authorities above cited, and Freeman on Judgments, § 1265, note, and § 127 and note. * * *

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But admitting that the tax deed is unassailable, and that the decree is valid, yet we ask for a reversal and judgment here for the whole land, because the evidence shows that appellant and her ancestor had been in open, adverse possession for ten years before suit. The tax sale was made January 2, 1872; the owner had two years from then in which to redeem; hence the Statute of Limitations was set in motion January 2, 1874. This suit was instituted June 7, 1884; and the fact that the tax title was confirmed did not stop the running of the statute. Bell *v.* Coates, 56 Miss. 779.

Plaintiff attempts to reply to the Statute of Limitations by introducing in evidence a lease from Robert Williams to Calib Williams, made in 1874, of 200 acres of the Buck Harrison place. Second, commissioners' deed made in September, 1872, to Robert Williams, which does not embrace the land in controversy; and, third, the partition deed between heirs of Robert Williams, showing that Mrs. Davis obtained the Buck Harrison place, and that the land in controversy is omitted. The rejoinder we make is, first, it is immaterial whether the land was occupied through mistake or not, for it is the possession which makes possession adverse without reference to the cause thereof. Metcalf *v.* McCutcheon, 60 Miss. 146. Second, while the petition deed between the heirs of Williams shows that by such deed Mrs. Davis did not acquire the land, yet it does not show that she does not own the land, nor that Robert Williams did not own and claim it — but on the other hand, the evidence shows that Calib Williams rented the land in controversy in January, 1871, from Robert Williams, and he, Robert Williams, then pointed out the lines, and that Calib occupied it continuously till the day of trial, while the deed from the commissioners to Robert Williams was not made till September, 1872, nearly two years after Robert Williams had rented to and placed Calib upon the land in controversy.

Brief of W. H. Fitzgerald:

The assignment of error of Mrs. Davis is that the court below erred in adjudging the "wild land" to plaintiff below and the assignment of plaintiff below is that she did not get all the land sued for.

Counsel for Mrs. Davis argues the invalidity of the tax deed from French to Gibbs upon the grounds:

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First. That the assessment-roll was not presented to the board at the proper time.

Second. That the roll was never approved by the board.

Third. That the levy was made on same day the roll was presented.

Fourth. That the levy was excessive.

All of these objections are answered in Nevin *v.* Bailey et al., 62 Miss. 433, construing section 1709, Code of 1871. But for that section the deed would be void; but that section being a part of the Revenue Law of the State makes the deed good after the lapse of three years. * * *

There is no pretense for saying that Mr. Williams ever claimed the land sued for. Mrs. Davis only interposed the claim that she acquired title by adverse possession. She supposed she had acquired title to the land because of the occupancy of eight acres of it by Calib Williams, tenant of her father, and afterward her own tenant on the "Harrison place." The court below decided that she having no color of title could only hold the eight acres held by Calib. Suit was brought for the entire eighty and judgment rendered for plaintiff for the eighty less the eight acres held by Calib Williams. * * *

The court below admitted in evidence the other record in the confirmation case to contradict the decree, or rather to show that the Chancery Court was without jurisdiction because of the absence from the record of an order of publication. The records of the Chancery Court were searched for an order of publication and never was found and almost certainly none was ever in it. I think that inquiry was unnecessary and wrong, for two reasons: First, because the decree is conclusive evidence of title, and cannot be assailed, being regular on its face, on any account in a collateral proceeding. * * *

But for the fact that that character of evidence is conclusive, the decree might be contradicted in its recital of jurisdiction by other parts of the record showing that the recital is not true. Upon that ground alone could it be assailed in any case. If the decree in this case can be assailed in that way in a collateral proceeding, then there is no difference between a decree confirming tax titles and other decrees, and the use of "conclusive evidence" means nothing. The recital of the decree that publication had been duly made is the highest evidence of that fact. The proof

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of publication is not part of the record. Yerger *v.* Ferguson, 55 Miss. 196.

If I am wrong in my position that the decree is conclusive and if inquiries can be made of the balance of the record to show that its recitals are false, and if *an order* of publication was necessary, competent proof that there never was a record of such order, the decree would be void for want of jurisdiction of the parties. * * *

I insist, however, that no *order* of publication was necessary. The statute dispenses with an order of publication.

Section 578, Code of 1880, on that subject, is not subject to construction. It plainly says that the notice shall require the appearance of the party on the return day, not to be less than two months from *the date of the first publication.*

Section 1753, Code of 1871, is substantially the same. * * *

I maintain that the court below erred in refusing to give plaintiff below judgment for the entire land sued for, notwithstanding it was shown that Calib held and occupied the eight acres for ten years. * * *

If Mr. Williams had been in the actual or constructive possession and delivered it to Calib as a part of the land rented, the holding of Calib as his tenant would have been for Mr. Williams, and at his death for his heirs. Mr. Williams made no mistake in the lease to Calib, and the lease is the only evidence of the transaction between Calib and himself, and it does not contain the eight acres. * * *

But Mr. Williams was never in possession, and by his contract of rent only put Calib in possession of the Harrison place. But as Calib did not claim the eight acres for himself, and his possession was not adverse to Mrs. Gibbs or her vendor, possession of land without claim of title is not adverse. Adams *v.*. Guice, 30 Miss. 397; Snodgrass *v.* Andrews, 30 Miss. 472; 45 Miss. 193; 55 Miss. 671.

The deed of partition between the heirs-at-law of Robert Williams conveys the "Harrison place" to Mrs. W. O. Davis, the appellant, but particularly describes it by legal subdivisions as it is described in the deed from Lincoln, commissioner, to Mr. Williams. Mrs. Davis, therefore, did not acquire any interest in any contiguous lands that may have been supposed to belong to the Harrison place. * * *

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OPINION.— CAMPBELL, J.:

In a suit under section 1753 of the Code of 1871, in which the defendants were unknown to the complainant, so described and proceeded against, no order of publication was required and the notice prescribed, and without any order of publication, when published as directed, was sufficient to give the court jurisdiction. If the defendants were known, and nonresident, or could not be found in this State, they were to be made parties as in other cases and an order of publication was required; and this explains the mention in the section of an "order of publication." The decree confirming the tax title was valid, and, therefore, precluded the inquiries relied on to defeat it.

The court rightly adjudged to the plaintiff below the land sued for outside of the enclosure, because as to that there had not been adverse possession; and to the defendant the enclosed land because as to it, there had been such possession long enough to bar recovery.

Affirmed.

JOHN TRIPLET, Executor *v.* F. J. THORNTON, Administrator, etc.

Tax Title — Deed from Sheriff to State — Code 1857, Article 36, Page 80.

Under chapter 3, article 36, Code of 1857, the State can acquire title to land sold for taxes only by deed from the sheriff.[1]

Statute of Limitations.

When a person is enjoined from prosecuting a remedy by a decree of court, the time during which such person has been so restrained will

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1

A sale of land by a tax collector for the nonpayment of taxes is the exercise of the naked statutory power; and if the law authorizing the sale be not strictly complied with, the sale will be void. Hodge *v.* Wilson, 12 S. & M. 498; Doe *v.* Natchez Ins. Co., 8 S. & M. 197; Minor *v.* Natchez, 4 S. & M. 602; Natchez *v.* Minor, 10 S. & M. 246.

Article 36, page 80, Code of 1857, is as follows:

"If upon offering all the land of any delinquent taxpayer, no person will bid for it the whole amount of the taxes and all costs, the collector shall strike off the same to the State, and convey the same to the State in one deed, to be acknowledged in due form before the clerk of the probate court. He shall in like manner execute deeds to individuals purchasing lands at such sales, and he shall, on, or before the second Monday of May, file with the said clerk, separate lists of the lands sold to the State, and to individuals, and the amount of tax and costs, specifying each item of said costs, for which the same were sold, and said clerk shall record said lists in a

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not be computed as any part of the period limited for the commencement of such action. Code of 1857, page 402, art. 26.[2]

Trust Estate — Lien of Trustee for Costs and Expenses.

A trustee in a deed of trust, or a commissioner appointed by court to sell the trust property, has a lien on the trust property for all necessary expense and can enforce same in the Chancery Court.[3]

Same — Lis Pendens.

One who buys property pending a suit by a trustee to enforce his lien for necessary expenses and costs incurred in the administration of the estate is chargeable with notice thereof although not a party to the suit.[4]

In 1860, one Rawles borrowed $5,000 from N. G. Park and gave a deed of trust on some land to secure same. G. W. Thornton was named as trustee. The deed of trust and the record of it were destroyed by fire. In 1863, Rawles sold the land to W. B. Gilliam. In 1866, Thornton, trustee, filed a bill in chancery against Rawles and Gilliam to establish the deed of trust and record and for the sale of the land to pay the debt. Thornton was appointed a special commissioner, by the court, to sell the land to pay the debt due to Park. In 1868, this decree was rendered and in the same year Gilliam filed a bill of review to impeach this decree and enjoining the sale of the land. This injunction was on motion of the trustee and commissioner dissolved in April,

book kept for that purpose, and shall within ten days after the same is filed, forward a certified copy of the list of lands sold to the State, to the auditor to be by him filed and registered in a book kept by him for that purpose."

2

Article 26, page 402, Code of 1857, is as follows:

"When any person shall be prohibited by law, or restrained or enjoined by the order, decree or process of any court in this State, from commencing or prosecuting any action or remedy, the time during which such person shall be so prohibited, enjoined or restrained, shall not be computed as any part of the period of time limited by this act for the commencement of such action." See Sugg v. Thrasher, 30 Miss. 135; Marshall v. Minter, 43 Miss. 666; Wilkinson v. Flowers, 37 Miss. 579; Work v. Harper, 31 Miss. 107.

Where a beneficiary is enjoined from enforcing a trust deed, the Statute of Limitations is suspended pending the injunction, though in disregard of it he makes a sale which is afterward vacated. Savings Institution v. Buchanan, 60 Miss. 496.

3

Without an express contract therefor, a trustee is entitled to compensation for executing the trust. The English rule to the contrary does not prevail in this State. Niolon v. McDonald, 71 Miss. 337.

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1874. While that suit was pending, some litigation sprung up between Park and Thornton and in August, 1874, Mrs. Park, widow of N. G. Park, filed a bill against Thornton enjoining him from selling the land and almost immediately after this injunction was dissolved, Mrs. Park filed a second bill against Thornton enjoining him from selling the land and this bill was dismissed and the injunction dissolved November 20, 1877.

In February, 1871, while these suits were pending, A. P. Shattuck purchased the land from the State, taking a deed from the auditor. The sheriff of Chickasaw county, where the land was situated, did not make a deed to the State as required by article 36, chapter 3 of the Code of 1857, but transmitted a delinquent tax list. In 1877, while the second suit of Mrs. Park against Thornton was pending, the object of which was to prevent Thornton from selling the land to pay the costs and expenses he had incurred as trustee and commissioner, A. P. Shattuck bought the claims of Mrs. Park, the heir of N. G. Park, and also the claim of W. B. Gilliam. Thornton advertised the land for sale under the trust deed and decree to reimburse himself for the costs and expenses incurred as trustee and commissioner. Shattuck thereupon filed the bill in this case in the Chancery Court of Chickasaw county, January 3, 1878, against Thornton seeking to enjoin him from selling the land, setting up his several sources of title.

Thornton answered the bill in which he impeached the tax title among others on the ground that there was no deed from the

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While trustees have a lien on the trust fund for costs and expenses incurred in its administration agents employed by them must look to the trustees alone for the payment of their services and expenses in the management of the trust estate, and this although the instrument creating the trust provides that the expenses of the administration shall be charged upon the fund, and authorizes the trustee to appoint agents. "To do anything which the said trustees could do in the execution of the trust." Fearn *v.* Mayers, 53 Miss. 458.

4

One purchasing land *pendente lite* is bound by the decree though not a party. Osborn *v.* Crump, 57 Miss. 622; Willis *v.* Gattman, 53 Miss. 721.

One who buys property pending a bill to enforce a vendor's lien thereon is chargeable with notice thereof although not a party. Allen *v.* Pool, 54 Miss. 323.

A decree in chancery binds a purchaser of the property *pendente lite*, without his being made a party by amended bill. Shotwell *v.* Lawson, 30 Miss. 27.

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sheriff to the State. He set up his claim for expenses and made his answer a cross-bill in which he sought to enforce his lien for expenses. Thornton died and the suit was revived in the name of his administrator. Shattuck also died and the suit was revived in the name of his executor.

From a decree dismissing complainant's bill and granting relief on the cross-bill directing an account to be taken allowing Thornton for all proper and necessary expenses incurred in the discharge of his duties as trustee and a reasonable fee for attorney complainants appeal.

APPEALED from Chancery Court, Chickasaw county, BAXTER MCFARLAND, Chancellor.

Affirmed, May 25, 1885.

Attorneys for appellant, Orr & Orr and R. Davis.

Attorneys for appellee, Houston & Reynolds.

Brief of Orr & Orr:

Your attention is called to the seventh section, act of 1860 (Feb. 10th), which provides that "All sales of land hereafter made for nonpayment of taxes * * * shall be valid * * * and that no such sale shall be impeached or questioned in any manner, or for any cause, saving fraud or mistake in the assessment, or sale of the same, * * * and no suit to set aside any title acquired under such sale, hereafter to be made, shall be brought, unless within five years from the date of the sale." Sheet Acts 1860, p. 213 *et seq.*

This section, and the decisions construing it and similar statutes, is, we take it, the law of the case, so far as the tax title is concerned.

Is a mistake in the name of the owner such a mistake as will under this act, which was intended to broaden and strengthen the Revenue Laws of the State, vitiate the title acquired under that assessment? For what was that sale? For the specific taxes due on this land for the year of 1867. In construing and applying the act of 1841, this court, so far back as 1852, intimates that

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such a mistake would not vitiate a sale. Baskin *v.* Doe ex. dem. Winston, 24 Miss. 431.

* * * * * * * * * * * *

The chancellor fixes a lien upon the land for attorney's fees. The court will bear in mind that this lien is fixed upon Shattuck's land, not Park's nor Thornton's. Now the record in this case shows that Park's estate was perfectly solvent, that he owned more than 600 acres of land at the time and long after this suit was commenced, that said land was free from incumbrance, and that no claims had been probated against his estate.

In Bamsley *v.* Powell, Ambler's Ch. Rep. 102, a lien for attorney's fees and costs was allowed upon real estate after the court was satisfied that the client was a lunatic, and after it was shown that the personal estate was not sufficient to discharge the claim. In the case at bar, we show that Park was and is perfectly solvent. This court has decided in two cases that a lien for attorney's fee could not be fixed upon land. Martin & Bates *v.* Harrington, 57 Miss. 208; Stewart *v.* Flowers et al., 44 Miss. 513.

Shattuck owned Gilliam's title, Gilliam owned Rawle's. Was not Dolly Park bound under section 2297, Code of 1871, to satisfy the record when her demands had been paid by Shattuck?

Will equity set aside a tax title acquired under the act of 1860, because the land is assessed to the wrong person? Will she lend her hand to aid Thornton in the collection of commissions and thereby fix a lien upon this land when the record shows that more than a quarter of a century ago he had the funds in his hands out of which he could have made his commissions, and voluntarily surrendered them? Will she hold for naught the seventh section of the act of 1860, which says that this tax title must be attacked within five years after the sale, or not at all? Will she encourage secret liens by declaring that Thornton, who had money in his hands subject to this lien at the time this appellant went into possession, can now subject this land to the payment of his extortionate claims, when he voluntarily paid out the funds and thereby waived his lien?

Brief of R. Davis:

Appellee raised for the first time the question of the State's title. Does not the fact that the clerk had certified the list of lands sold to the State, to the auditor of public accounts, raise the pre-

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sumption that the sheriff had freely discharged his duty and is not this presumption strong enough to require rebutting testimony? We show every evidence of title that the auditor had, or was required to have. * * *

But aside from all this, we insist that the seventh section, act of 1860, p. 46, cures all defects. There is no saving clause in the limitations there prescribed.

Brief of Houston & Reynolds:

* * * * * * * * * * * *

The tax title is invalid.

There is no deed from the sheriff of Chickasaw county to the State. There is a delinquent tax list, but this list does not transmit title under Code 1857, pp. 80, 81.

The land was advertised to be sold as the property of Shaw. It was assessed in the name of Linn. This "mistake" in the sale and assessment will vitiate the sale. * * *

At the time of Shattuck's purchase, and from that time until the present suit, with the exception of a few months, Thornton was enjoined from selling the land. From December, 1868, to 1874 by Gilliam; from 1874 to 1877 by Mrs. Park, and from 1878 to present time by Shattuck. The remedy which we seek to enforce against the land is the sale of it to pay expenses, etc., and from pursuing that remedy, Thornton has been enjoined, immaterial by whom, or whether Shattuck had any connection with it or not; during that period, the limitation does not run. Sugg *v.* Thrasher, 30 Miss. 135; Work *v.* Harper, 31 Miss. 107; Code of 1857, p. 402, art. 26. * * *

The right of Thornton to be reimbursed out of the land was the subject-matter of contest, and it was decided that Thornton had the right to sell the land for the expenses which were incurred under the power of attorney and under the original trusteeship. Pending this second suit, Shattuck buys the claim of Mrs. Park on the land. It is plain that the decree in the suits are binding on Shattuck and estop him from disputing the validity of Thornton's claim. * * *

The decree is binding on Shattuck as a privy to Mrs. Park, or, because he purchased his interest pending the litigation respecting it, and is charged not only with notice, but also estopped by the

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decree which was rendered as much as the actual parties are. Allen *v.* Pool, 54 Miss. 323.

If Shattuck is not charged with notice of the pendency of the suit and estopped by the decree which was rendered, he had actual notice before his purchase from Gilliam and from Mrs. Park of the equities of Thornton against the land, and against the claims which Mrs. Park assigned to Shattuck. This actual notice is proven by Thornton, who testifies that he informed Shattuck of his claims on the land. * * *

Thornton was trustee under the Rawles deed of trust, was "trustee and special commissioner" under the decree of 1868, vested with the title for the purpose of sale; was attorney in fact of N. G. Park, with unlimited powers in reference to the claims of Rawles and of Darden, and with an equitable assignment of these claims to reimburse himself for expenses already incurred and those that might be incurred in future, and especially were these claims equitably assigned to Thornton to pay attorneys' fees for the suit in which the deed of trust was re-established, and also, in any subsequent suit to enforce the decree in that case. * * *

As trustee under the trust deed or decree, he could enforce his lien for necessary expenses against the trust estate. Fearn *v.* Mayers, 53 Miss. 458; Clopton *v.* Gholson, 53 Miss. 471; Perry on Trusts, 907–918; Satterwhite *v.* Littlefield, 13 S. & M. 306; Shirley *v.* Shattuck, 28 Miss. 25. * * *

It may be true that Thornton might have proceeded against the estate of Park for reimbursement. * * * If he could, his right to go against the estate of Park does not, *ipso facto,* debar him from the right of proceeding against the property upon which he has a lien, or which has been assigned to him for the purpose of satisfying his demand. * * *

OPINION.—PER CURIAM:

Shattuck did not acquire title by his purchase of the land from the State in 1871, because it does not appear that the State had title. The land was never conveyed to the State, and it had no title to convey, so far as this record shows.

Shattuck acquired an interest by his purchases from Mrs. Park and Gilliam, but held subject to the claim of Thornton to be reimbursed his legitimate expenses, about the trust committed to

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him. It was, therefore, proper to dismiss the bill of Shattuck, since it appears that something was due to Thornton. We decline to decide now what Thornton should be allowed, as the matter is not before us.

All we decide is, that it was right to dismiss the bill, as some amount was due Thornton. What he should be allowed is the subject of the cross-bill, the decree of which is not before us.

The dismissal of the bill exhibited by Shattuck is,

Affirmed.

JOSEPH E. LOFTIN v. STATE OF MISSISSIPPI.

Evidence — Improper Testimony.

It is reversible error in a trial on the charge of murder to permit testimony to go to the jury showing that between the trial in the magistrate's court and the trial in the Circuit Court two State's witnesses were shot by unknown parties, unless the defendant is shown to have been connected with the shooting.[1]

Same — New Trial.

Where testimony which is improperly admitted *may have* materially operated in producing a conviction, a new trial will be awarded.[2]

Joseph E. Loftin was convicted of murder, and appeals. At the trial in the Circuit Court the State introduced, among other witnesses, Marion Martin and Ambrose Martin, who had appeared as State's witnesses at the preliminary trial before the justice of the peace, and whose evidence was of great importance to the State.

1

It is error to admit testimony which does not prove or tend to prove the issue. Railroad Co. *v.* Tyson, 46 Miss. 729.

Evidence of facts not in issue, but so connected with the matter at issue as to form a part thereof, is relevant and admissible. Stein *v.* Brunswick Co., 69 Miss. 277.

The test of admissibility of evidence is its relevancy and not conclusiveness. It is for the jury, not the court, to decide as to its weight. Everman *v.* Robb, 52 Miss. 653.

2

The admission of irrelevant evidence is error, if it be likely to mislead the jury. Dougherty *v.* Vanderpool, 35 Miss. 165.

A new trial will not be granted for the admission of illegal evidence, where it appears that there is no probability of a different result on another

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Both of these witnesses testified that between the time of the trial in the justice's court and that in the Circuit Court they had been shot by unknown parties. The defendant was under arrest at the time and confined in jail thirty or forty miles distant, and is not shown to have been in any way connected with the shooting; neither was it shown that the shooting was at the instance of his friends. Counsel for defendant objected to the introduction of this testimony, but the court allowed it to go to the jury. The defendant was convicted, and on appeal assigns as error the action of the court in permitting this testimony to go to the jury.

APPEALED from Circuit Court of Lawrence county, A. G. MAYERS, Judge.

Reversed and remanded, March 15, 1886.

Attorneys for appellant, A. C. McNair, A. H. Longino.

Attorneys for appellee, T. M. Miller, Attorney-General.

Brief of A. C. McNair, A. H. Longino:

* * * The court erred in permitting testimony of the shooting of the State's witnesses, Marion Martin and Ambrose Martin, without connecting defendant therewith. Under no circumstances was that testimony admissible unless Loftin had in some way been connected with the shooting.

The evidence on the part of the State fails to show that he was in any manner a party to the shooting or responsible for it. It

trial, and where it also appears that justice has been done. McMullen *v.* Mayo, 8 S. & M. 298; Routh *v.* Agricultural Bank, 12 S. & M. 161.

If it is manifest to a reasonable certainty that justice has not been done a new trial will be granted. Taylor *v.* Sorsby, 1 Walk. 97.

When incompetent evidence of great import is deliberately introduced, and it cannot be said with confidence that no other conclusion than that of guilty could have been reached on the legal evidence, the fact that the jury was subsequently instructed to disregard the incompetent testimony will not cure the error, and for this a new trial will be granted. Chism *v.* State, 70 Miss. 742.

A verdict will not be disturbed unless it is manifest from the whole record that it is clearly wrong, or unless misdirection or other apparent error may have produced it. McAlexander *v.* Puryear, 48 Miss. 420; Pfeifer *v.* Chamberlain, 52 Miss. 89.

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was in fact admitted by the district attorney that at the time of the shooting of the witnesses appellant was in jail at Hazlehurst, a distance from the scene of the shooting of thirty or forty miles.

Again the evidence of the defendant is positive that he knows nothing of it, and was in no manner responsible therefor. When he was informed of the shooting he repudiated the conduct of the party or parties who did it.

In the case of The State *v.* Rothschild, 68 Mo. 52, the question was as to the admissibility of evidence similar to that in question. The court held the admission of the evidence to be error, as there was nothing to connect Rothschild with the alleged tampering with the witness, and it says that it will not do to say that the testimony being irrelevant did the defendant no harm, since the court had sanctioned its relevance by admitting it. The effect of the irrelevant testimony was thus just as damaging to all intents and purposes as if it had in truth and fact connected defendant with the alleged attempt to tamper with and remove the witness from the State. * * *

In the case of State *v.* Jaegers, 66 Mo. 173, the question was the same as in this case and the Rothschild case, and the Missouri court held that it was error to admit the evidence without in some way connecting the defendant with the fact proposed to be proved. * * *

The effect of this illegal evidence was to prejudice the mind of the jury against the defendant and this court cannot say that it may not have had such effect. Then, if such may have been its effect, under the rule announced in Lyne's case, this court will reverse. * * *

In Lyne's Case, 36 Miss. 617, this court uses this language in reference to the improper reception of evidence. "In cases purely circumstantial, it is impossible for the court to determine what influence the testimony may have produced upon the mind of the jury. We deem it a safe rule to leave to the jury disputed questions of fact and, therefore, where evidence has been improperly admitted *which may* have materially operated in producing conviction, even in cases where our own minds might incline to sustain the verdict upon the testimony which was legal, the case will be reversed, that the appropriate tribunal may pronounce upon the real facts in dispute; and only in cases where the illegal testimony *could not have changed* the result will this court refuse to set aside

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the verdict and judgment and award a new trial." This case, as the Lyne's case, is one of purely circumstantial evidence on the part of the State, and the same principle will exclude the evidence objected to in this case that did so in the Lyne's case. From the examination of the evidence embodied in the bill of exceptions, the court will readily perceive how potent and effective may have been this illegal evidence on the mind of the jury.

Brief of T. M. Miller, Attorney-General:

* * * The seventh assignment of error having reference to the admission of the testimony of Marion and Ambrose Martin (two important witnesses for the State), that they were shot by some unseen and unknown person, presents the only difficulty in the case. I submit, however, that conceding the testimony to have been illegal, the judgment should not have been reversed on that account. It is not the case of an attempt by the State to prove that the defendant committed a distinct crime from that for which he was being tried. Such testimony would be manifestly prejudicial as well as illegal. Here it was shown that the defendant was forty miles away, in jail, and unlike the case of State *v.* Rothschild, 68 Mo. 52, mainly relied on by counsel, it was not hinted or pretended by the court or district attorney so far as this record shows, that the defendant had aught to do with it. It appears to have been the relation of episodes in the personal history of the witnesses, and no rational jury directed by the court and bound by their oaths to consider only the evidence for or against the accused can be supposed to have been biased against him on that account.

In the cases cited and in those upon which they were founded and in all kindred cases of reversals for the admission of illegal evidence the natural effect of it was to induce a belief in the defendant's connection with the matter proved; some extravagant abuse of his powers with relation to it by the judge, or else the testimony was calculated to excite prejudice against the accused.

Judge Sherwood, in the Missouri cases, in his glowing style says that: Where verdicts owe their birth to prejudice *rather than to evidence* the court's sanction to such unwarrantable results will be refused.

But I insist that where reasonably viewed the irrelevant, and hence illegal, matter could not in all human probability have induced or contributed to the result and where the verdict rests

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upon abundant testimony which cannot fairly be suspected, it should not be disturbed.

I accept the rule as laid down in Lyne's Case, 36 Miss. 617, viz.: A new trial in a criminal case will be granted when illegal evidence has been admitted that might have operated prejudicially in producing the verdict, but when it is certain that the illegal evidence did not tend to procure it, it must not be upset.

"Only where the illegal testimony could not have changed the result will this court refuse to set aside the verdict and judgment."

It will be observed, however, in Lyne's case, that the illegal evidence was emphasized before the jury in three ways: First, by overruling defendant's objection to it. Second, by refusing to exclude it on his motion, and third, by the court's refusing to instruct the jury to disregard it. It was, besides, calculated reasonably to induce belief in defendant's guilt.

I further admit that "Courts will rarely presume that illegal evidence could not have had any effect in producing the verdict." But a judgment of conviction will not be reversed because of the improper admission of such proof if it appear from the whole case that the error did not operate to the prejudice of the accused. Clark *v.* People, 31 Ill. 479; People *v.* Gonzales, 35 N. Y. 8 Tiff. 49.

A judgment will not be reversed on the ground of the admission of impertinent evidence, if harmless. Stephens *v.* The People, 4 Park. Cr. Rep. 396.

I append to this brief a list of cases, cited, with more or less propriety by the text-books, to support the proposition that a judgment will not be reversed because of the admission of impertinent, irrelevant, or immaterial evidence, or for the exclusion of that which is material and relevant when it appears that no harm was done or the case could not have been strengthened. * * *

I commend to this court the views of the Supreme Court of California in the case of The People *v.* Graham, 21 Cal. 261. In that case, the victim of an assault, a child six years of age and not possessing the requisite capacity to be a witness, was placed upon the stand, examined, and withdrawn before testifying to anything material. It was urged that the appearance of the little victim on the stand was calculated to influence the mind of the jury against the defendant, and a new trial was sought for that reason among others. But the court held there was nothing in the point, and

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said: "Unless we can trust to the intelligence and integrity of juries to withstand such influences we must dispense with the use of juries as a part of the machinery for the administration of justice." * * *

Cases alluded to above: Lynes *v.* State, 36 Miss. 617; Stephens *v.* People, 4 Park. Cr. Rep. 396; Bird *v.* State, 14 Ga. 43; Mathis *v.* State, 33 Ga. 24; Wise *v.* State, 2 Kan. 419; Jackson *v.* Scharff, I Oreg. 246; Evans *v.* State, 44 Miss. 762; State *v.* Graham, 21 Col. 261; Waterman Co. Dig., New Trials; Evidence.

OPINION.—CAMPBELL, J., delivered the opinion of the court:

It was error to permit the witnesses Marion Martin and Ambrose Martin to testify to having been shot, and while we would not hesitate to affirm the judgment notwithstanding this error, if able to say confidently it was harmless, not being thus convinced, we must set aside the verdict which may have been partly produced by it.

The evidence is circumstantial, and the conviction rests chiefly on the testimony of the two boys above named, each of whom had been shot, as he testified, and although it was admitted that the attempt on their lives could not have been by the defendant in person, the inference very likely to be drawn was that it was in his interest, and it was well calculated to excite suspicion that the effort was to destroy evidence against the accused, and to create unfavorable presumptions against his innocence.

Reversed and remanded for a new trial.

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B. J. JOHNSON v. F. W. HUNT.

Evidence — Peremptory Instruction.

Where there is no conflict in the evidence and the evidence for defendant showing a perfect defense, is uncontradicted and unexplained, it is proper to give a peremptory instruction for defendant.[1]

Statute of Frauds — Parol Sale of Personal Property.

A parole sale of personal property of more than $50 in value is not within the Statute of Frauds when the property is delivered to the purchaser.[2]

Replevin by B. J. Johnson against F. W. Hunt to recover possession of a portable steam engine, boiler, and other appurtenances, of the value of $410. From verdict and judgment for defendant plaintiff appeals.

On the trial plaintiff testified that the property belonged to him, and it was admitted that the property was in the possession of defendant when levied upon. Defendant did not deny that plaintiff

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1

A peremptory instruction should not be given for the defendant if the state of the evidence be such that the court would not vacate a verdict predicated thereof in plaintiff's favor. Rhynes *v.* Jackson Electric Railway, Light & Power Co., 85 Miss. 140.

Where the plaintiff's evidence does not conduce to prove the cause of action the court may instruct for defendant. Such power should not be exercised except in cases where there is no room for doubt. Swan *v.* Insurance Co., 52 Miss 704.

A peremptory instruction is proper only where all the facts in evidence taken as true, with every just inference from them, fail to maintain the issue. Whitney *v.* Cook, 53 Miss. 551.

In case of conflict in the evidence the view which is most favorable to the party against whom the instruction is asked must be taken as true. Carson *v.* Leathers, 57 Miss. 650.

Where there is a material conflict of evidence, a peremptory instruction should not be given. Richardson *v.* Toliver, 71 Miss. 966; Thrasher *v.* Gillespie, 52 Miss. 840; Cantrell *v.* Railroad Co., 69 Miss. 435; Timberlake *v.* Compress Co., 72 Miss. 323.

Peremptory instruction is improper unless the court on the evidence would set aside a contrary verdict. Bernheim *v.* Dibrell, 66 Miss. 199; Holmes *v.* Simon, 71 Miss. 246.

When the evidence is sufficient to warrant a verdict for a party in any view of it which may be legally taken, a peremptory instruction in favor of his opponent should not be given. In granting a peremptory instruction, the court assumes as true all testimony tending to establish the issue in favor

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had owned the property, but testified that he bought the property and found it in the possession of one E. Johnson. M. D. Graham testified for defendant that plaintiff had sold the property to E. Johnson. This was in no way contradicted or explained by plaintiff's evidence.

The court gave a peremptory instruction for defendant.

Defendant's motion for a new trial was overruled and he appeals.

From the Circuit Court of Scott county.

Affirmed, October 26, 1885.

Attorneys for appellant, S. H. Kirkland, Calhoon & Green, and D. C. Wasson.

Attorney for appellee, J. K. P. Palmer and Huddleston & Nichols.

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of the losing party. Railroad Co. *v.* Boehms, 70 Miss. 11; Holmes *v.* Simon, 71 Miss. 245; Tribbett *v.* Railroad Co., 71 Miss. 212.

If there is any evidence upon which the jury might find for the plaintiff it is error to give peremptory instruction for defendant. Lowenstein *v.* Powell, 68 Miss. 73.

A case should be withdrawn from the jury only where it is free from doubt, where a verdict for plaintiff would not be permitted to stand assuming the truth of the testimony. Railroad Co. *v.* Doyle, 60 Miss. 977.

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Parol partition of lands between co-owners followed by occupancy in severalty is valid. Wiley *v.* Bonney, 31 Miss. 644; Pipes *v.* Buckner, 51 Miss. 848.

A parol agreement between coterminous owners, fixing an uncertain and disputed boundary between their lands, followed by possession is valid and binding. Archer *v.* Helm, 69 Miss. 730.

Sale of personal property is ordinarily completed by its delivery to the purchaser. Pierson *v.* State, 66 Miss. 510.

Verbal sale of cotton worth more than $50 wholly on credit is within the statute unless part of the cotton is delivered. Delivery of samples is a compliance with the statute when they are treated by both parties as part of the property sold and as diminishing the quantity or weight of the property sold to the extent of their own bulk and not as specimens merely. Moore *v.* Love, 57 Miss. 765.

On a verbal contract for the future delivery of forty bales of cotton of a certain weight and at a certain price, delivery of eight of the bales will satisfy the Statute of Frauds if delivered and accepted as in partial fulfillment of the contract. Stonewall *v.* Peek, 63 Miss. 342.

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Brief of Calhoon & Green:

First. The court erred in instructing to find for defendant.

The plaintiff by his evidence made out a case entitling him to recover. He proved that the property was his; the defendant, not denying the plaintiff's evidence or disputing that the property had been plaintiff's, undertook the affirmative defense of showing that plaintiff had sold to another. The burden of proof was on defendant to establish this, and the defendant thereby became the real plaintiff. Just as if the defendant had confessed and avoided. In such case, he became plaintiff and is entitled to open and conclude. When then the court instructed the jury to find for defendant, it was really instructing to find for the plaintiff. It is never the province of the court to instruct to find for plaintiff. An instruction to find for defendant is usual when the plaintiff fails to make out his case, for the burden of proof being on him, if he fails successfully to bear that burden, no recovery can be had. It is otherwise when the court instructs to find for plaintiff; then as matter of law, the court decides on the weight to be given to the facts proven, which violates section 1714, Code 1880. Such instructions, in legal effect, are equivalent to a demurrer to evidence. It is a power at best to be used with great caution, and only in the clearest cases.

Second. Such instruction, if proper in any case, was improper here.

Plaintiff proved that he was the owner of the property. Defendant introduced Graham, who testified there was a sale by plaintiff to E. Johnson; that the reason he knew there was a sale was that plaintiff and E. Johnson in 1881 rehearsed in his presence the terms of sale and contract made by them in which they said that B. J. Johnson had sold the mill and some other property to E. Johnson. (Record, 17, 18.)

This was all the evidence tending to divest plaintiff's title. It was insufficient. Loose declarations of parties are, at best, poor criterions of facts, and especially when gathered years afterward from the memory of the adverse party. Graham knew nothing of his own knowledge. He says the parties rehearsed the *terms of sale and contract.* He does not attempt to give the "terms of sale and contract." *Non constat* it was a conditional sale with title reserved. Here were "*terms of sale and contract;*" not only a *sale* but also a *contract* in regard thereto. What this contract

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was we are not informed? Certain it must have been some limitation upon the contract of sale. The burden was on the defendant to prove that plaintiff's title had been divested. Note how cautious Graham is after stating that the Johnsons rehearsed "in his presence the terms of sale and contract made by them." He continues by not giving the matter rehearsed, viz.: "the terms of sale and contract," but by stating "in which" (i. e., rehearsal) they said "B. J. Johnson had sold the mill and some other property to E. Johnson." This might have been true, and yet it might have been a sale with title reserved, or to vest title upon some other condition. They might have, in the rehearsal, have said there was a sale and yet this would be only a part of the rehearsal, for there were *terms of sale* and a contract. The conclusion of Graham, or rather the recital of a part of what was said, should not be sufficient to prove that the sale was a sale by which plaintiff's title was divested.

Third. The first instruction for plaintiff should have been given.

Brief of S. H. Kirkland:

The evidence clearly showed both title to and possession of the property in controversy to have been in B. J. Johnson, which the law presumed to continue until the contrary is shown by competent testimony. Accepting the testimony of witness M. D. Graham, upon whom the appellee solely relied to prove that the title had passed out of B. J. Johnson as true in every particular, what does it prove? Nothing more than in the opinion of B. J. and E. Johnson there had been a sale of said property by B. J. Johnson to E. Johnson.

This may have been a conclusion of said parties. 55 Miss. 649. And a conclusion which the lower court seems to have adopted without a syllable of testimony showing or tending to show there had been a delivery of said property by B. J. to E. Johnson, or a compliance with the Statute of Frauds by payment or part payment of the purchase money, the property being worth more than $50, or that the contract of sale was in writing and signed by said B. J. Johnson. Code of 1880, § 1295.

Title in another, after plaintiff has shown title in himself, is affirmative matter, and the burden is on him who sets it up to show that the right or title in another is so complete or of such character as to confer the right of immediate possession.

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We showed by the testimony of Hoskins (Record, pages 13 and 14), that B. J. Johnson had both title to and possession of the property in controversy, and there is nothing in the whole testimony which by any fair inference disproves these facts; hence for these reasons, we think the instruction clearly erroneous.

Brief of D. E. Wasson:

I shall consider all the assignments together.

"When a fact is once shown to have existed, the law presumes its continuance," and since it was shown by the agreed statement of William Hoskins, that the mill was bought from Hoskins by Johnson and delivered to B. J. Johnson by Hoskins, the law presumes the title to remain in B. J. Johnson until the defendant showed by competent testimony that B. J. Johnson had been divested of the title by a sale or some transfer of the possession of the property by B. J. Johnson. The whole testimony goes to show that B. J. Johnson was owner of the property and the only evidence relied on by the defendant goes to show that B. J. Johnson was owner of the property, unless there was a sale of the property by B. J. Johnson as stated by M. D. Graham and Hunt, the defendant, Graham's testimony, when weighed according to the facts stated by him, divested of all the presumptions of said Graham, fails to show that there was a sale of the property to E. Johnson by B. J. Johnson. Graham states that "the parties rehearsed in his presence the terms of sale and contract made by them in which *they said that* B. J. Johnson had sold the mill and some other property to E. Johnson.

Graham does not state what the terms of the sale were; whether there had been a delivery, or that the contract was in writing, or that any part of the purchase money was paid, and one of these facts was needful to comply with the Statute of Frauds, as it had been shown by the sheriff's return that the property was worth more than $50 and not denied by defendant in his testimony. Code 1880, § 1295.

The court will not assume that there was a sale by plaintiff B. J. Johnson to E. Johnson on the mere say so of the parties; the facts must be stated that the court may judge whether there was a sale, and will not indulge in vague presumptions.

It will not do to say that Hunt's statement "that he found the property in possession of E. Johnson and got some of it at E.

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Johnson's house" will make out the sale coupled with Graham's testimony. The court will observe by the statement of Hunt that he bought the property from M. D. Graham, and not from either of the Johnson's, and neither of the Johnsons stated to Graham (so far as the evidence shows) that the property was ever delivered to E. Johnson, or that anything was done to warrant the court in reaching the conclusion that there had been a sale. (Pages 17, 18, 19 of the record).

Plaintiff showed that the title of the property was in him, the value of the same, and rested his case. It then devolved upon the defendant to show the title in himself or some other one than B. J. Johnson, to warrant a verdict for the defendant; this I contest defendant signally failed to do.

If I am correct in these conclusions, then the court below erred in refusing the instructions of plaintiff, and granting instruction for defendant. Smith *v.* Sparkman, 55 Miss. 649. Code 1880, §§ 1295, 1292.

I contest that the instructions asked by plaintiff and refused by the court stated the *clean written law,* and should have been given and the facts left to the jury to decide. The court assumed that there was a sale of the property by B. J. Johnson to E. Johnson, and thus assumed the right that should have been left to the jury to say whether the statements of the witness were to be believed by the jury.

If M. D. Graham claimed or had title in the property, why was it defendant's attorneys did not inquire of Graham as to his title or rights in said property, as he would not or did not testify to any title or right to it? Graham said that at the time of the conversation between B. J. Johnson and E. Johnson, that M. D. Graham & Co. *were* interested in the property. Mark you! He (Graham), while on the stand, does not breathe a word that he claimed any interest or title to the property at the bringing of the suit. The theory of counsel of appellee is contradictory in my judgment. Counsel argues in one breath that the property was delivered to B. J. Johnson by Hoskins on the order of M. D. Graham & Co. In the next breath, counsel say that there was a sale of the property by B. J. Johnson to E. Johnson, and relies on Graham's testimony to show this. The truth is, the defense cannot escape the confession that there was a sale of the property by Hoskins to B. J. Johnson, and that the title passed

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into B. J. Johnson, and that M. D. Graham & Co. were merely to become paymasters to Hoskins, and did pay Hoskins. If it had been otherwise, Graham could have very easily stated it for the benefit of his own interest. Graham clearly recognizes that B. J. Johnson was owner of the property, and to show that B. J. Johnson sold the property, the statement of Graham about what the two Johnsons said is relied on. Coupled with Hunt's statement, Hunt says he bought from Graham. Why is it that Graham is silent about sale to Hunt? When Hunt undertakes to say he found property in possession of E. Johnson, but does not say that E. J. ever gave possession of the property to Hunt. Why all this dodging? I undertake to answer and say, it is to defeat B. J. J. out of his rights. One counsel for appellee says in his brief, that Hunt said E. Johnson *delivered* possession of the property. By reference to Hunt's evidence, it will be seen that Hunt states "he found the property in the posssession of E. Johnson, got some at his (E. Johnson) house," and as to where he got the other the record does not disclose. Another presumption, when Hunt says he found it in the possession of E. Johnson, it might be reasonably inferred that Hunt got the property without the consent of E. Johnson, and more than this, why not as reasonably conclude that E. Johnson was at the time Hunt got the property the agent of B. J. Johnson, which was no doubt true from all inferences. But I do not rely on these doubtful questions, inferences and presumptions for the reversal of the case. I do not contend that the instruction was improperly granted for defendant, and if this is true, then the case should be reversed. (See pp. 17, 18, 19, of record for testimony.)

This certainly was a case where the facts to be decided should have been given to the jury, under proper instructions, and I contend that those asked by plaintiff should have been given, for they certainly announced the law correctly as applicable to the case. As to authorities on the question of sale, see Smith *v.* Spardkman, 55 Miss. 649; section 1295, Code 1880.

It seems to me that plaintiff could have with less violence to the law, asked the court to grant an instruction directing jury to find for plaintiff, than one asked for by defendant. I care not whether the theory of plaintiff be that of title or right of possession, it does not alter the plaintiff's right to recover in this case, for he has shown both title and the right to possession. Hunt

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shows no right in it. He fails to show title from any one other than Graham, who by his own testimony shows no right to the property, whatever to the contrary. Graham's theory is the title vested in E. Johnson, and to retain possession defendant must either show title in some one other than plaintiff, or that he (Hunt) acquired rightful possession, neither of which did he show. There really was no sale shown to E. Johnson by B. J. Johnson. If Graham had stopped in his testimony when he said (in answer to the first question) "it had been sold," the court might have indulged in some vague presumption that there had been a sale. He left no doubt that there was not enough said to constitute a sale. (Page 17 of record.)

If the title of this property was in B. J. Johnson, at the bringing of this suit, then Hunt's possession was not rightfully, and hence his possession was unlawful. Counsel for appellee (Palmer's) brief, page 3, says that "there is no dispute in the testimony that M. D. Graham & Co. were interested in the property, and that there is no dispute in the testimony that appellant sold the property to E. Johnson, and that Hunt bought from Graham and got possession from E. Johnson. There is a dispute over the question of sale. We say, that what Graham stated does not show a sale. If this is true, the bottom is out of appellee's case. There is a dispute as to whether Graham & Co. were interested. The testimony of Hoskins shows title in B. J. Johnson, and if M. D. Graham & Co. had not been paid by B. J. Johnson, that would deprive plaintiff of the right to possession in this action, under the facts in this case.

Counsel argue that the plea of not guilty admits nothing, but I say that the facts introduced by defendant in effect admits the title to have been in B. J. Johnson, and counsel saw the necessity of introducing testimony to *attempt* to show that the title had passed out of B. J Johnson, another dodge on part of counsel to get rid of plaintiff's title.

The testimony failing to show that the plaintiff had parted with his title, as the evidence of appellee effectually admits, then there should have been a verdict for plaintiff (under proper instructions, such as were asked by appellant).

I have been lenghty, owing to the fact of a hard-working, poor client, being, as I honestly think, defeated of his just rights in the court below, and desiring that the matter should be fully

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presented to those who must with the evenly balanced scales of justice weigh the matter for final settlement, in whose judgment I have abiding confidence, and to whose decision I will meekly bow, without words of censure, if decided against my client.

Brief of J. K. P. Palmer:

The appellant's theory of this case seems to be that title is the only question to settle, and for the purpose of proving title, they introduce Hoskins, who says that he delivered the property to appellant upon the order of M. D. Graham & Co., M. D. Graham & Co. agreeing to pay for it. That M. D. Graham & Co. did pay for it. That he would not have delivered the property to appellant except for the order of M. D. Graham & Co., and their agreement to pay for it. Record, p. 13.

M. D. Graham, a witness for defendant in the court below, says that in 1881, long before the bringing of this suit, appellant and one E. Johnson came to him, and rehearsed the terms of a sale of this property, and other property, by appellant to said E. Johnson. Said witness gives as a reason for these parties coming to him and rehearsing the terms of this sale, that M. D. Graham & Co. were interested in the property. (Record, pp. 17 and 18.)

Hunt, appellee, says that he bought the property from M. D. Graham, and that E. Johnson delivered possession to him. (Record, p. 18.)

This is all the testimony in the case. It does not show or tend to show title in appellant. It does not show that the property was wrongfully detained from appellant. It does not show that appellant is legally entitled to the immediate possession of the property. This testimony does not tend to prove either of these acts.

When appellant shows that he got the property from Hoskins upon the order of M. D. Graham & Co., and that they paid for it, the fair and reasonable presumption is that it was purchased for them. If it was otherwise, appellant should have shown it. M. D. Graham says that M. D. Graham & Co. were interested in the property long after this delivery by Hoskins to appellant, to-wit, in 1881.

If the testimony of Hoskins showed that the title passed from him to appellant, and this is all that it does show, defendant shows by the statement of appellant that he sold to E. Johnson. Appel-

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lant says that we fail to show such sale as will take it out of the Statute of Frauds. Defendant does not show in the testimony the terms of the sale, but shows that there was a sale made; thus we would expect to find the property in possession of the appellant's vendor. And when possession is shown in E. Johnson, the requirements of the statute are met and complied with. There is not testimony in this case to support a verdict for plaintiff.

It is not disputed in the evidence that appellant received the property from Hoskins, upon the order of M. D. Graham & Co. and their agreement to pay for the same. That M. D. Graham & Co. were interested in the property. That appellant sold the property to E. Johnson. That Hunt bought the property and got the property from E. Johnson.

These being the facts shown, and they failing to make the case for the plaintiff, and there being conflict in the evidence, the result was a legal contention and this being the case, the instruction was correctly given.

Appellant says the statement of Graham and Hunt should have been passed upon by the jury. That the jury should have been allowed to say whether their statements were true. Certainly the jury would not say their statements were false, when there is no evidence, direct or circumstantial, which is in conflict with their statements. They tell a reasonable story, appellant offers no opposing evidence, but permits it to go to the jury undisputed.

Appellant says that his title to the property was admitted by the defense made. I find a plea of not guilty as the only plea, and if this plea admits anything, I have failed to become fully acquainted with this venerable landmark of the law.

Brief of Huddleston & Nichols:

The disputed point in this case seems to us to be whether the testimony tends to prove any *necessary* fact, which, if proven, would authorize the court in allowing a verdict of the jury for the plaintiff to stand.

Admitting for sake of argument of the point that the testimony of W. S. Hoskins proved title of the mill in appellant. The testimony of M. D. Graham that appellant and one E. Johnson said in his presence that they had traded, and the testimony of appellee that he received the property from said E. Johnson, all of which took place subsequent to the purchase from Hoskins,

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shows clearly that the property was traded to E. Johnson by B. J. Johnson, and delivered. And the testimony fails to show that B. J. Johnson ever owned or had possession or right of possession of the property after his sale to E. Johnson.

We understand the rule to be that when the testimony of the plaintiff falls so far short of entitling him to the verdict of the jury, that were a verdict rendered in his favor, the court would, on motion of defendant for a new trial, set it aside; then the court should anticipate the ultimate result, and instruct the jury to find for the defendant. We, therefore, contend that in this case, the court below rightly refused the instructions of the plaintiff, and overruled the motion for a new trial.

OPINION.—CAMPBELL, J.:

While we would like to have a fuller development of the facts of this case than the record presents, we do not feel authorized to reverse the case.

It was testified that the plaintiff had sold the property sued for to E. Johnson, in whose possession it was shown to have been before the institution of this action, and the testimony was unexplained and unqualified. A sale imparts a transmutation of title and possession.

If the plaintiff had parted with the title, he had no right to recover.

All questions as to the validity of the alleged sale with reference to the Statute of Frauds is disposed of by the fact that the alleged purchaser had possession of the goods.

Affirmed.

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F. M. ROSAMOND *v.* THE STATE.

Murder — Instructions — Presumption of Malice.

In a prosecution for murder in which it appears that the fatal shot was fired by defendant with a shotgun, it is error to instruct the jury for the State that the presumption of malice arising from the use of a deadly weapon must prevail, unless from other evidence it is shown to the satisfaction of the jury that the killing was not malicious.[1]

Erroneous Instructions — Prejudice.

An instruction for the State which is erroneous, when taken alone, will not cause a reversal when the instructions given for defendant give him the benefit of the principles of law he is entitled to.[2]

Appellant, Rosamond, was tried and convicted of the murder of James Stephens; he was sentenced to the penitentiary for life, and appeals. The evidence showed that deceased was shot with a shotgun and killed. Defendant admitted that he killed deceased, but claimed it was done in self-defense.

The fourth instruction for the State was as follows:

"If the jury believe from the evidence that F. M. Rosamond, on or about the 21st day of July, 1883, with a shotgun that

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All persons are presumed to be absolutely innocent of a crime charged against them, in its entirety, and in all its material parts, until the jury finds to the contrary on proper instructions, based on competent and relevant testimony. Cook *v.* State, 85 Miss. 738.

On the trial of an indictment for murder it was charged to the jury "that every homicide is presumed to be committed with malice aforethought, etc., and it devolves on the prisoner to prove the circumstances which excuse the act." It was held that the charge was too broad and unrestricted, and it ought to have contained these additional words, "unless they arise out of the evidence produced against him." McDaniel *v.* State, 8 S. & M. 401; Green *v.* State, 28 Miss. 687; Hague *v.* State, 34 Miss. 616; Head *v.* State, 44 Miss. 731.

Presumption of a malicious intent may arise from the nature of the weapon used. Woodside *v.* State, 2 How. 656; McDaniel *v.* State, 8 S. & M. 401.

The statute does not alter the common law so as to limit murder to killing with express malice. The words "premeditated design," in the old statute, meant the same as "malice aforethought," in the common-law definition. McDaniel *v.* State, 8 S. & M. 401.

Where one is accused of murder, the law presumes him to be innocent until the contrary is made to appear; but if it be shown that he killed the deceased with a deadly weapon, the general presumption of innocence yields

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was a deadly weapon, shot deceased, Stephens, and thereby killed him, then the use of such deadly weapon is *prima facie* evidence of malice and an intention to murder and before this presumption is overcome it must be shown or arise out of the evidence in the case to the satisfaction of the jury that at that time the defendant was in immediate, real, or apparent danger of his life, or some great bodily harm from the deceased, and such danger must have been urgent, present, and imminent at the time of the killing."

Defendant's motion for a new trial was overruled, and he appeals.

APPEALED from Circuit Court, Montgomery county, C. H. CAMPBELL, Judge.

Affirmed, May 18, 1885.

Attorneys for appellant, W. S. Hill and R. F. Halloway.

Attorneys for appellee, J. L. Harris and T. S. Ford.

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to the specific proof, and the law infers that the killing, if unexplained, was malicious and, therefore, murder; but if the attendant circumstances be shown in evidence by the State or the accused, the character of the killing is to be determined by considering them. McDaniel *v.* State, 8 S. & M. 401; Green *v.* State, 28 Miss. 687; Mask *v.* State, 36 Miss. 77. (Head *v.* State, 44 Miss. 731, and Evans *v.* State, 44 Miss. 762, are in part disapproved.) Hawthorn *v.* State, 58 Miss. 778; Bishop *v.* State, 62 Miss. 289.

It is not true to say that the use of a deadly weapon imposes the burden of overcoming the presumption by evidence "to the satisfaction of the jury." Hawthorn *v.* State, 58 Miss. 778; Bishop *v.* State, 62 Miss. 289; Ingram *v.* State, 62 Miss. 142; Lamar *v.* State, 63 Miss. 265.

Although the law presumes malice from the deliberate use of a deadly weapon, this presumption should not determine the verdict in cases where there is a full disclosure of all the facts and circumstances surrounding the killing, but it should be considered simply as a part of the whole case. Lamar *v.* State, 63 Miss. 265.

It is error to instruct for the State that the use of a deadly weapon raises a presumption of malice which can only be overcome by the evidence to the satisfaction of the jury. It is sufficient if all the evidence leaves the question of his guilt in reasonable doubt. Hawthorn *v.* State, 58 Miss. 778; Ingram *v.* State, 62 Miss. 142; Dawson *v.* State, 62 Miss. 241; Bishop *v.* State, 62 Miss. 289.

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An instruction erroneous when viewed alone will not necessitate a reversal if there are liberal instructions for defendant in which all the law applicable was properly announced. Bishop *v.* State, 62 Miss. 289.

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Points of Counsel.

Brief of J. L. Harris:

This cause must be affirmed because the bill of exceptions, or what purports to be a bill, was not signed within the time prescribed by law.

The case should be dismissed because the transcript was not filed within the time prescribed by law.

Brief of T. S. Ford:

The first exception taken was to the ruling of the court refusing a continuance on the ground of the absence of Mrs. Stephens. In view of the fact that the witness was not in the State and one continuance had already been granted to procure her attendance, the action of the court was manifestly correct. The second exception was frivolous.

The motion to quash the return of the sheriff because all the jurors were not summoned appears to have been properly denied. The sheriff appears to have found forty-five out of the fifty persons named in the venire facias. No evidence was offered to show that

A verdict manifestly right will not be disturbed because of erroneous instructions. Wilson *v.* Kolheim, 46 Miss. 346; Storm *v.* Green, 51 Miss. 103; Vance *v.* State, 62 Miss. 137.

This court is loath to reverse a case because of error in the instructions, unless it be manifest that prejudice has been done the accused. Pollard *v.* State, 53 Miss. 410

Erroneous instruction will not necessitate a reversal if all the instructions considered as a whole correctly announce the law. Skates *v.* State, 64 Miss. 644; Nelson *v.* State, 61 Miss. 212.

All the charges must be construed together, both in civil and criminal cases; and if when so construed the law be correctly expounded, the judgment will not be reversed because one instruction taken by itself was too broad. Mask *v.* State, 36 Miss. 77; Evans *v.* State, 44 Miss. 762.

The giving of a bad instruction is no ground for setting aside a verdict, where it is clearly right on the law and the facts. Wiggins *v.* McGimpsey, 13 S. & M. 532; Head *v.* State, 44 Miss. 731; Evans *v.* State, 44 Miss. 762; Hanks *v.* Neal, 44 Miss. 212; M. & C. R. R. Co. *v.* Whitfield, 44 Miss. 466.

If an erroneous instruction be given on a material point, judgment rendered will be reversed unless it manifestly appear from the whole record that no prejudice was done to the complainant and that the judgment was clearly correct. Josephine *v.* State, 39 Miss. 613.

It is not error to refuse an instruction the substance of which has already been given in another instruction. Schrader *v.* State, 84 Miss. 593.

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the five other persons were, in fact, to be found. The refusal of the court to award an alias venire facias was not error.

Defendant objected to going into trial on the ground that he had been served with a copy of the venire facias containing the name of Granison Crockett whereas, in the original venire, it appeared as Granison K. Crockett. The record shows that the venire facias recited the name of Granison Crockett, and in point of fact, the defendant was mistaken. Besides the record shows that Granison Crockett was not on the jury impaneled to try the cause, and does not show that the defendant was compelled to challenge him.

The ninth and twelfth instructions propounded by defendant were properly refused. The ninth was abstract, and besides incorrect, and the twelfth only a repetition of what had already been several times given in substance, and besides was faulty in not defining in itself what was a legal excuse or justification for taking life.

The instructions given for the State which are complained of in the motion for a new trial have most of them been many times approved by this court. The fourth is a copy *mutatis mutandis* of the instruction approved in Guico *v.* The State, 60 Miss. 716. The others do not require comment.

It is respectfully submitted that the verdict of the jury was fully supported by the evidence, and that the jury being very elaborately and correctly instructed as to the law of the case, this verdict ought not to be disturbed.

Brief for appellant not found in record.

OPINION.—COOPER, C. J.:

The fourth instruction given for the State is subject to the criticism that by it the jury is told that presumption of malice arising from the use of a deadly weapon must prevail, unless from other evidence it is shown to the satisfaction of the jury that the killing was not malicious. A defendant is entitled to an acquittal if, on all the testimony, the jury has a reasonable doubt of the malice requisite to constitute murder. It is not true that on the evidence the jury must be satisfied that malice does not exist; it is its duty under the law to acquire if it is not satisfied that it does exist. The very liberal instructions, however, given for the defendant undoubtedly called the attention of the jury to the fact that the real

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meaning of the instruction as granted was that, in the absence of other evidence negativing the malice presumed from the use of a deadly weapon, the presumption was sufficient to warrant a conviction.

The judgment is *affirmed.*

JACOB ALLEN *v.* STATE OF MISSISSIPPI.

Verdict of the Jury — Insufficient Evidence.

The verdict of a jury will be set aside on consideration of the facts alone if they fail to sustain it.[1]

At the February, 1885, term of the Circuit Court of Adams county appellant, Allen, was convicted of the murder of John Coleman and sentenced to the penitentiary for life. His motion for a new trial was overruled, and he appeals.

The evidence for the State was in substance as follows: Several witnesses testified that deceased and his wife had, for some time, been on bad terms and had separated, the wife having gone

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The point of inquiry will be not whether the verdict is clearly right, but is it manifestly wrong; and if not manifestly wrong, the verdict will not be disturbed. Waul *v.* Kirkman, 13 S. & M. 599; Prewett *v.* Coopwood, 30 Miss. 369.

Whenever the evidence leaves it indifferent which of several hypotheses is true, such evidence cannot amount to proof, however great the probability may be. In this case the evidence (being entirely circumstantial) was declared insufficient to support a verdict of conviction. Algheri *v.* State, 3 C. 584.

Power to set aside on the ground that verdict is opposed by decided preponderance of evidence is exercised with great caution. McMann *v.* State, 13 S. & M. 471.

Reluctant as this court is to disturb a verdict upon the sole ground of the sufficiency of the evidence, where there is a palpable failure of proof to sustain the verdict, it will not be allowed to stand. Harris *v.* State, 71 Miss. 462; Monroe *v.* State, 71 Miss. 196.

Where there is no error in the instructions, this court will not disturb a verdict unless under the evidence it is clearly wrong, or except in a clear case of error, prejudice, or passion. Gamblin *v.* State, 45 Miss. 658.

A conviction will not be disturbed because the jury might have acquitted. Skinner *v.* State, 53 Miss. 399.

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to live on appellant's place; that deceased and defendant were at a church together and deceased was talking to his wife when defendant came up and some words passed between them and defendant made some threats against deceased and that deceased was seen the next day going toward the home of defendant and had disappeared and had never been seen since. Beverly Newton testified for the State that he saw deceased in defendant's field and defendant was with him, saw no blood or wound on deceased; saw the side of his face, it was pale; had a writ to arrest Coleman and went to defendant's house to arrest Coleman; after he got there he heard a gun shot, saw Allen within five steps of Coleman; Allen asked me what I wanted. I said I wanted no harm. Allen then ordered me out of the field. Coleman was lying on the ground with his feet toward me and his head toward Allen. Allen had a gun; he told me to get out of the field and that quick; I left immediately and a few days afterward Allen came by my field and told me that if I ever said anything about that he would do me the same way. I returned the writ to the justice of the peace, but did not tell him what I had seen. Did not tell this story until the grand jury met, did not tell anybody where the dead body was; went with two persons to hunt for the body but did not find it. I told a Mr. Boyer that all I knew about the body was from Frances Coleman. Frances Coleman told me about it on Sunday morning about three months before I told Mr. Boyer. Frances said Mike Williams told her about it. I told the grand jury that Frances told me. I told Wilson Perry about it. He promised me he would not mention it.

APPEALED from Circuit Court, Adams county, RALPH NORTH, Judge.

Reversed and remanded, June 8, 1885.

Attorneys for appellant, Martin & Lanneau and G. F. Bowles.

Attorney for appellee, T. S. Ford.

Brief of Martin & Lanneau and G. F. Bowles:

The giving of the sixth instruction for the State is assigned as error. * * *

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The jury is told that if they find a witness has perjured himself, they may believe him or not, at will. * * * They are told they may believe a part of his testimony and disbelieve a part. * * *

In this case the State has admitted as to Beverly Newton that he testified willfully to a falsehood in a material matter. The record shows that the conviction must stand or fall on his testimony, and his alone. * * *

Apply the instructions touching the proof needed to establish the *corpus delicti* and the value of circumstantial evidence. * * *

There is no direct testimony here of a killing at all. None certainly of a felonious killing. No one saw the killing; no one proves there was a dead body found in Allen's field. Death and felony can be predicated only from circumstances testified to by Beverly Newton. We propose to show him utterly unworthy of belief, and that even if he told the truth, what he testified to does not establish either that Coleman is dead, or that Allen killed him, or, that if he did a murder was committed. * * *

In view of his improbable story and the multiplied contradictions, does he establish the *Corpus delicti?*

But the *corpus delicti* must be proven to sustain a conviction. 1 Greenleaf Ev. 217; Potts *v.* State and authorities cited, 43 Miss. 472; 1 Whar. C. L. (7th ed.) 745, 746, 747; 41 Miss. 582; 33 Miss. 433; 26 Miss. 157; 1 Starke's ed. 575; 2 Hale's Pleas, C. 2900.

Brief of T. S. Ford:

The sixth instruction for the State, in connection with the fifth for the defendant, informs the jury correctly as to the law respecting the credibility of the witnesses.

The *corpus delicti* may be proven by cimcumstantial evidence as well as by direct evidence. Wills on Circumstantial Ev., 200–233; 3 Gr. on Ev., § 30. * * *

There is one case reported of the highest authority in which a conviction with circumstantial proof of the *corpus delicti* was upheld.

The defendant in the nighttime was seen to throw the body of his captain overboard at sea, having previously threatened to kill him. In this case the body was not found, nor was it proven

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whether the captain was alive or dead when thrown over. The prisoner was executed. Wills on Circumstantial Ev. 208. In that case, the proof of the death by direct evidence was made impossible by the act of the defendant, in which respect the case at bar is analogous. * * *

OPINION.—CAMPBELL, J.:

We are not willing for the verdict to stand.

It was rendered on insufficient evidence. The evidence of *corpus delicti* is far from satisfactory.. It consists entirely of the testimony of Beverly Newton, which is so strange, so improbable, and so much contradicted, as to make it an unsafe basis for a conviction of the highest crime known to law. We know the importance attached to the finding of a jury, and hesitate long before we will disturb it, but will not shrink from the duty to do it, where, as in this case, the verdict is clearly not supported by the evidence on an essential point.

Reversed and remanded.

R. W. GARRISON *v.* MRS. A. H. McINNIS.

Evidence — General Objections — Specific Objections on Appeal.

When only general objections are made to testimony in the lower court specific objections will not be heard for first time in Supreme Court.[1]

Ejectment — Tax Sale to Liquidating Levee Board — Redemption.

Where lands have been sold for taxes to the Liquidating Levee Board but redeemed from said sale within the time prescribed by law a subsequent sale by the commissioners of said board is void.[2]

Same — Adverse Possession.

Open, actual, and notorious adverse possession of land for more than ten years confers title.[3]

Ejectment by appellant, Garrison, against appellee, McInnis. From verdict and judgment for defendant plaintiff appeals. Affirmed.

1

Objections to evidence not specifically pointed out in the court below are considered as waived and will not be noticed here. Hence, where upon a general objection, judgment and execution under which land was sold, and the sheriff's deed, were excluded, it was held that the action of the court

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Statement of the Case.

On the trial plaintiff introduced a deed from the sheriff of Washington county, in which the lands in controversy were situated, to the commissioners of the Liquidating Levee Board and a deed from S. Gwin and W. L. Hemingway, commissioners of said board, appointed in the case of Green *v.* Gibbs et al., in the Chancery Court of Hinds county to himself and rested. This last deed was dated April 27, 1881, and the first was dated May 20, 1869.

The defense was a redemption of the land in 1870 and adverse possession for more than ten years.

Several witnesses testified that defendant did have a certificate of redemption of the lands in controversy, but that it had been lost; that they saw it and testified to its contents; there was also evidence that the defendant and those under whom she claimed had been in actual possession and occupation of the lands since 1870, renting it to tenants and exercising acts of ownership over it.

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below could not be sustained, if otherwise wrong, upon the ground that a copy of the appraisement made under the Valuation Law had not been delivered to the defendant in execution, that objection not having been made in the court below. Doe *v.* Natchez Insurance Co., 8 S. & M. 197.

The high court will not notice any objection to evidence not raised in the court below. Chew *v.* Read, 11 S. & M. 182.

2

Under the act of 1858 the right of redemption in two years exists as well where individuals are purchasers as where the land is sold to the levee board. Heard *v.* Walton, 39 Miss. 388.

3

Adverse possession, though under parol gift, if it continues for ten years, confers a perfect title. Davis *v.* Davis, 68 Miss. 478; Magee *v.* Magee, 37 Miss. 138.

The adverse possession to be available must have been continuous. Tegarden *v.* Carpenter, 36 Miss. 404; Nixon *v.* Porter, 38 Miss. 401.

Adverse possession must be an invasion of the rights of the opposite party. Magee *v.* Magee, 37 Miss. 138.

What constitutes an adverse holding is a question of law, but the intent of the possessor, which is always material, is a question for the jury. Magee *v.* Magee, 37 Miss. 138.

The ten years' occupation, as declared in the statute, vests a full and complete title, upon which the land can be recovered in ejectment, without further evidence than the facts showing such possession. Ellis *v.* Murray, 28 Miss. 129; Ford *v.* Wilson, 35 Miss. 490; Davis *v.* Bowmar, 55 Miss. 671.

That neither actual occupation, cultivation, or residence is necessary to constitute actual possession when the property is so situated as not to admit of any permanent, useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right and would not exercise over

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Statement of the Case.

For plaintiff, the court instructed the jury that the deed to the commissioners of the levee board was *prima facie* evidence of title in the levee board and that the deed to plaintiff from the commissioners was *prima facie* evidence of title in plaintiff.

For defendant, the court instructed the jury that if the land was sold to the levee board for taxes in 1869, but was redeemed in 1870, they should find for defendant notwithstanding the fact that the land was sold by Gwin and Hemingway, commissioners, in 1881, and that the actual, notorious, and continuous adverse possession of the land for more than ten years would confer title on defendant.

Plaintiff made objection to the introduction of some of defendant's testimony, because it was "irrelevant and incompetent."

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property which he did not claim. McCaughn *v.* Young, 85 Miss. 292; Ford *v.* Wilson, 35 Miss. 490, 72 Am. Dec. 137.

Possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious and adverse. McCaughn *v.* Young, 85 Miss. 294; Alexander *v.* Polk, 39 Miss. 737.

Proof of ten years' actual possession under claim of ownership will *prima facie* defeat recovery in ejectment on a tax title executed and operative more than ten years prior to the suit, since the possession and claim will be presumed to have been adverse to the tax deed. Graham *v.* Warren, 81 Miss. 330.

Cultivation of a part of a tract and acts of ownership over the remainder without hindrance for ten years gives title to all. Gathings & Watson *v.* Miller, 76 Miss. 651.

A statute does not run in favor of a tenant in common until he has actually ousted his cotenants, or done some act deemed by law equivalent thereto. Bentley *v.* Executor, 79 Miss. 302.

A void deed is sufficient to constitute color of title. One who enters under color of title and holds adversely may extend his possession to the whole land embraced in his deed. But a mere intruder can extend his possession only to the extent of his actual occupancy. Wellborn *v.* Anderson, 37 Miss. 155; Ryan *v.* Miss. R. R. Co., 62 Miss. 162.

A defendant having color of title is not a mere intruder. Nixon *v.* Porter, 38 Miss. 401.

Void title as to part of the land conveyed and occupation of that part to which the grantee had title will not give the grantee constructive possession of the other part to which he had no title, so as to disseize the real owner. To divest the rightful owner of a whole tract the partial occupation must raise a reasonable presumption that the rightful owner knows that the entry was made under color of title, otherwise the disseizin will not extend beyond the actual occupation. Jones *v.* Gaddis, 67 Miss. 769; Mitchell *v.* Bond, 84 Miss. 72.

A mere scrambling possession is not sufficient. Mitchell *v.* Bond, 84 Miss. 72.

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Plaintiff's motion for a new trial was overruled, and he appeals.

APEALED from Circuit Court of Sunflower county.

Affirmed, November 9, 1885.

Attorneys for appellant, Nugent & McWillie.

Attorneys for appellee, J. M. Jayne and C. S. McInnis.

Brief for appellant not found in record.

Brief of Jayne & McInnis:

There are but two questions presented by the record in this case. First. Was the land in controversy redeemed from the liquidating levee commissioners?

Second. Is the appellant barred of his remedy by reason of the adverse holding of the appellee and her vendors, if there was not a redemption?

The determination of either of these questions in behalf of the appellee settles the controversy.

1. Was there a redemption of the lands in controversy within the time allowed by law? The land was sold for taxes on the 20th day of May, 1869. The redemption, if any, occurred in the month of May, 1870, within two years from the date of the sale, the time allowed under the statute for redemption. Acts 1858, p. 37. So if there was a redemption, it was within the time allowed by the statute. Then was there a redemption? * * *

If, as contested by counsel for appellant, the officer must perform his duty and cancel the deed, before redemption becomes complete, then we admit that we did not redeem. Will the performance of all the duties enjoined by the statute upon the owner of the land amount to a redemption? We think so. 54 Tex. 378; 3 W. Va. 522; Desty on Taxation, 888, 889, and cases there cited. These cases decide that where a tender of the money due is made by the owner of the land to purchaser, at tax sale, for the amount of taxes due and damages, the tender *ipso facto* works a redemption. The idea is that a payment of the amount due for taxes and damages, or a tender of the amount due, works redemption. I can see no difference between a purchaser at tax sale

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and the State or levee board, when the land is struck off to them. They are as much of a purchaser as a private individual. And if a tender of the amount due would work a redemption between individuals, would not a payment of the amount due to the proper officer of the levee commissioners work a redemption? * * *

If the argument of counsel for appellant is correct, there was no one in 1870 to whom this payment could be made. There was no Probate Court and the chancery clerk could not receive it. The board of levee commissioners, acting under the law of 1858, whose treasurer had his domicile in Prentiss, Bolivar county, had become defunct, and were not in existence. The very object of the act of 1867 was to create a new levee commission, for the purpose of winding up or liquidating the debts due by the *ante bellum* levee board, acting under the act of 1858.

But there was one or more persons to whom this payment could be made. The law of 1867, § 3, p. 245, provides that the land sold for taxes shall be liable to redemption as is provided in the Acts of 1858. In the Acts of 1858, the redemption can be made by payment of the amount due, to the treasurer of the levee board, or to the probate clerk of the county in which the lands are situate. So we think redemption in 1870 could have been effected by paying the amount due to the chancery clerk of Washington county, the county in which the lands were then situate, or to the treasurer of the liquidating levee board, *who did not have his office at Prentiss, Bolivar county.* * * *

In arguing this branch of the case, we have assumed that it made no difference who paid the money to the levee treasurer in 1870. If the money was paid by the owner of the land or his agent, it worked a redemption of the title from the levee board, and they could not convey title to Garrison. If a stranger paid the money in 1870, and the owner failed to redeem from such stranger within two years from May, 1869, the date of sale, the stranger became a *purchaser* from the levee board, and they had no title to convey to Garrison. So it makes no difference, in so far as Garrison is concerned, whether the party paying the money in 1870 operated as a redemptionist or as a purchaser.

2. If no redemption of the land was made, and the title conveyed to the levee board in 1869 ripened into a perfect title, can that title be defeated by an adverse holding for ten years of one in possession with color of title?

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In the discussion of this branch of the case, counsel for appellant discuss the standing of an intruder and holding through tenants, etc., as against a public corporation, etc. While the record is defective in setting forth fully McInnis' title, we think enough appears to show that she holds the land by descent from her husband, who purchased the same from Barnett and McLeod. * * *

Then did the Statute of Limitations run against the levee board, from the time the land is supposed to have vested in them? The Statute of Limitations ran against the State and all public corporations from the adoption of the Code of 1857, up to the year 1877, when the law authorizing the Statute of Limitations to be taken against the State was repealed. Code 1857, art. 25, p. 402; Code 1871, § 2169; Irving *v.* Green, 54 Miss. 450; Clemants *v.* Anderson, 46 Miss. 581. Did the repeal of the law, allowing the statute to run against the State, apply also to the public corporations created by the State? We think not. 46 Miss. 581. If it did not, the appellants were barred unless the holding of appellee was a permissive holding. There is nothing in the record tending to show a permissive holding, but on the contrary, every act of appellee was hostile to the title of the appellant and his vendors.

OPINION.—ARNOLD, J.:

Both of the defenses made by the appellee, to wit, that the land in controversy was redeemed within the time specified by the statute, and adverse possession of the land for ten years prior to the commencement of the suit, are supported by the testimony.

The objections made by the appellant to certain testimony in the court below, were general, and specific objections to the same cannot be availed of here. There is no error in the instructions and the judgment is *affirmed.*

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WADE HARVEY et al. v. WM. R. MILES et al.

Probate Court — Final Decree.

A final decree of a Probate Court upon matters within its jurisdiction unappealed from and unreversed is conclusive and is not subject to attack in a collateral proceeding.[1]

Will — Powers of Executors to Sell Property to Pay Debts.

Where a will confers full power on the executors to sell any of the estate, real or personal, to pay debts, a sale of a part of the land of the testator to pay a debt incurred by the executors for attorney's fee for defending suits against the estate is valid and binding and will not be set aside at the suit of the devisees.[2]

D. M. Dulaney died in 1848, testate, devising his property to his two daughters, Mrs. Mary Sample and Mrs. Elizabeth Harvey, equally for life with remainder to their respective children.

1

Presumptions will not be indulged in favor of the jurisdiction; jurisdictional facts must appear affirmatively in the record. They cannot be proven by parol. Root *v.* McFerrin, 37 Miss. 17.

The judgment of a court in a matter within its jurisdiction, however erroneous, is final and conclusive until reversed, and it cannot be set aside in any collateral proceeding. Wall *v.* Wall, 6 Cush. 409.

Decrees of Probate Court in all matters within its jurisdiction are presumed correct unless the record shows to the contrary. Smith *v.* Denson, 2 S. & M. 326; Herring *v.* Wellons, 5 S. & M. 354; Henderson *v.* Guyott, 6 S. & M. 209; Prestige *v.* Pendleton, 6 Cush. 379; Hutchins *v.* Brooks, 31 Miss. 430; Crowder *v.* Shackelford, 35 Miss. 321.

A judgment is not merely *prima facie* evidence of its own validity, but conclusive where the record shows jurisdiction over the person and the subject-matter. Miller *v.* Ewing, 8 S. & M. 421; Wright *v.* Weisinger, 5 S. & M. 210.

A judgment which is merely erroneous and voidable cannot be impeached collaterally. Smith *v.* Bradley, 6 S. & M. 179; Work *v.* Harper, 2 Cush. 517.

The judgment of a court having jurisdiction of the subject-matter and the parties is conclusive so long as not reversed and cannot be attacked collaterally, however irregular and erroneous. This is true of a decree in favor of an administrator on a final settlement. Moore *v.* Ware, 51 Miss. 206.

A judgment merely erroneous and not void cannot be attacked collaterally. Parisot *v.* Green, 46 Miss. 747.

2

It is essential to the validity of a sale of either real or personal property made by an administrator or executor that it should be made in pursuance

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The will contained the following provisions :

"1. It is my wish that the negroes, horses, mules and stock of all kinds together with all farming utensils remain on the farm and my executors are to continue farming until they can raise a sufficient amount of money for the payment of all my just debts unless they should think it necessary to sell a portion of the above property for the payment of my debts.

"2. I do furthermore confer on my executors full power to sell any of my estate either real or personal for the payment of debts should they think necessary."

Before the death of the testator some suits had been filed in the Circuit Court against him, and he had employed William R. Miles to defend them, and after his death suits aggregating a large amount were filed and the executors made an agreement with said Miles to defend all the suits, agreeing to give him a

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of a valid order of court, unless when by statute it is otherwise provided or where the will directs differently. Gelstrop *v.* Moore, 4 Cush. 206; Edmundson *v.* Roberts, 2 How. 822.

A suit had been instituted by the testator in his lifetime — the amount in litigation being about $48,000. At his death the counsel he had employed had removed from the State and the case was unprepared for trial. The executors being ignorant of the facts of the case employed an attorney at $5,000, contingent, however, upon success. The suit was gained and the legatees objected to the fee as exorbitant. Held, that the executors are only bound to act in good faith in such cases, and to exercise such care and prudence as a prudent and cautious man would exercise for himself; and that the employment and fee were proper. Noel *v.* Harvey, 7 Cush. 72.

An administrator will not be allowed credit for money paid to counsel whose employment was entirely unnecessary, owing to a sufficient number of counsel having been already previously engaged. Crowder *v.* Shackleford, 35 Miss. 321.

The allowance of commissions is intended as a compensation for his whole expense, labor, and responsibility of administering the estate and he is not, therefore, allowed to charge the estate with his expenses in employing lawyers to assist him in the administration of the estate, except that when he is compelled to bring suit for the estate or defend claims brought against the estate he is entitled to the lawyer's fee so expended. Satterwhite *v.* Littlefield, 13 S. & M. 302.

He will not be allowed expenditures for counsel fees unless he shows that the services were rendered for the benefit of the estate. Brandon *v.* Hoggett, 32 Miss. 333.

As to the question of the creation of a trust for the payment of the testator's debts, see Gordon *v.* McDougall, 84 Miss. 715, and the cases cited in the opinion of the court and the briefs of counsel.

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fee of $5,000, contingent upon his defeating these suits, and he went into the courts and defended all the suits successfully, and the executors paid him the fee, conveying to him in part payment of same some lands that had belonged to the testator, Dulaney. At the April term, 1852, of the Probate Court of Holmes county, where the land was situated, the executors of Dulaney filed their final account with a petition asking for the allowance of same. An order of citation was made for all the devisees under the will, both life tenants and remaindermen. Among the items of credit claimed in this account was the item of $5,000 paid to said Miles by the executors. At the July, 1852, term of said court a decree was entered allowing the final account and allowing full credit for this item. Complainants never appealed from that decree.

At the September, 1884, term of the Chancery Court of Holmes county complainants, children of Mrs. Elizabeth Harvey and Mrs. Mary Sample, filed the bill in this case against William R. Miles and some parties to whom he had given mortgages on the land conveyed to him by the executors, in which they sought to have the deed given by the executors to Miles canceled as a cloud on their title. The bill alleges that in 1848, about a week after D. M. Dulaney's death, and before his will was probated, and before the executors had become acquainted with his affairs, said Miles fraudulently, and by misrepresentation of the real condition of the suits pending against the estate, obtained from the executors a contract to pay him a fee of $5,000 to defend them, when he had agreed with said Dulaney in his lifetime to render the same service for $500, said executors negligently making no investigation, and that the land in controversy was conveyed to him by the executors in part payment of this fee; that complainants were ignorant of their rights until some time in 1882, and as the papers relating to the administration of the estate were lost, they could not have learned sooner, and besides they were misled by Miles' misrepresentations.

Defendant Miles answered the bill, denying all charges of fraud. The cause was heard on bill, answer, and proof, and on final hearing a decree was rendered denying relief sought by complainants and dismissing their bill. It should be further stated that there were other debts due by the estate of Dulaney, and the executors sold some of the personal property to pay the debts.

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APPEALED from Chancery Court, Holmes county, R. W. WILLIAMSON, Chancellor.

Affirmed, April 20, 1885.

Attorneys for appellant, Gwin & Noel.

Attorney for appellee, C. V. Gwin.

Complainants appealed from the decree dismissing their bill.

Brief of Gwin & Noel:

* * * * * * * * * * * *

First. The answer admits, by not denying the allegation, that D. M. Dulaney's estate was more than sufficient to pay his debts. L. Noel's deposition proves the same thing. Of the forty negroes appraised, only about seven, and but a small part of the other personalty, were sold. The first clause of D. M. Dulaney's will provided for paying his debts from his farm, unless the executors should think it necessary to sell his property to pay his debts, in which event they were authorized to sell the negroes or personal property. The second clause gives them full power to sell any of his real or personal property to pay his debts. The two clauses taken together indicate his intention of their resorting first to the personalty.

"The exoneration of the real estate by the personal is an important doctrine of equity jurisprudence in administering estates, as well as being in full conformity with our general policy that whenever the intention of the testator does not clearly conflict with such an interpretation, real estate shall be applied to debts, legacies, and charges, only so far as the personal assets, the primary fund, prove insufficient, notwithstanding mere directions in the will to sell or mortgage for such purposes." Schouler on Executors and Administrators, § 512, and authorities cited.

It was, therefore, illegal for the executors to sell Miles the land, under the circumstances, with the large amount of personalty that there was on hand, for the appraisement was at low figures, as shown by the sale of the six negroes for $10,000, who were

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appraised at $4,200. There was never a time when the executors could have said, "We think it necessary" to sell the land, or the part of it deeded Miles. The contingency on which they were authorized to convey never arose.

A power to convey, based on a contingency, cannot be exercised till the contingency arises. 60 Miss. 328.

Land is only liable for debts when the personalty is exhausted. 42 Miss. 449.

Second. The $5,000 fee to Miles was not Dulaney's debt. If any real debt at all, it was merely a part of the expenses incurred in administering on D. M. Dulaney's estate, and was under the law of 1849 (Hutchinson's Code, pp. 66, 67), no charge on the testator's realty, and there was no legal authority by which the executors could make use of land in paying such a debt. 44 Miss. 325.

Third. The second clause of D. M. Dulaney's will is as follows: "I do furthermore confer on my executors full power to sell any of my estate real or personal for the payment of my debts should they think it necessary."

No power is there given to sell the land for any other purpose than the payment of Dulaney's own debts; and the conveyance by the executors to Miles, as a credit on a debt of their own contraction, is void. * * *

Fourth. The power given to the executors by Dulaney's will only authorized, under any circumstances, in our opinion, a cash sale. The credit of $1,250 on the $5,000 fee did not constitute either a cash or credit sale, nor was it contemplated or authorized by the will. It was not a sale to pay Dulaney's debts, but a mere bargain for a credit on their own debt. We do not believe this court will sanction the action of executors in turning over to a creditor on his debt their testator's property, especially as it was a debt of their own contraction. * * *

In their final account the executors credited themselves with that $5,000 paid Miles. As to notice, the evidence shows that throughout the transaction, Miles knew more of it than did the executors. * * *

Brief of C. V. Gwin:

Two matters are involved in this controversy. The complainants seek: First. A recovery of part of the $5,000 paid to Wil-

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liam R. Miles as a fee by the executors of Daniel M. Dulaney; and, second, to set aside and cancel the deed of conveyance made by the executors of Daniel M. Dulaney to William R. Miles.

The question of the payment of the $5,000 to William R. Miles by the executors of Daniel M. Dulaney, as a fee due to General Miles for professional services, is long since *res adjudicata*, not only as to these complainants, but as to all persons claiming as distributees under the will of Daniel M. Dulaney.

The question of General Miles' right to his fee of $5,000, and the liability of the estate of Daniel M. Dulaney to him therefor, has been the subject of judicial investigation and determination on three several occasions, and on each of these occasions was adjudged a valid claim against the estate of Dulaney.

A very succinct and accurate statement of the facts attending this $5,000 fee will be found in the statement of facts and opinion in Noel et al. *v.* Harvey et al., 7 Cush. (29 Miss.) 72, the record of which case constitutes a very large part of the transcript in the cause now under consideration. * * *

Among the items of credit claimed by the executors in their final account was the item $5,000 paid to General Miles by the executors for attorney's fees, and of which $5,000 constituted the contingent fee in the Gooch-Dulaney suit.

At the July term, 1852, of said court, a decree was entered allowing the final account and discharging the executors, allowing the executors full credit for the $5,000 Gooch-Dulaney fee.

The complainants never appealed from or complained of this decree on final settlement, but Leland Noel and Margaret, his wife, and David W. Sanders and Benjamin W. Sanders, by Leland Noel, next friend, filed their bill of review against Jones Harvey, S. Sample et al., executors of Daniel Dulaney, to set aside the decree allowing the final account, and setting up the allowance of the $5,000 paid General Miles as one of the two grounds relied on for reviewing the decree. Noel et al. *v.* Harvey et al., 7 Cush. 72.

The bill of review was dismissed by the Probate Court of Holmes, and from the decree of dismissal Noel et al. appealed to the High Court of Errors and Appeals, where the decree as to the allowance of General Miles' fee of $5,000 was affirmed, but reversed on other grounds stated in the case. Noel et al. *v.* Harvey et al., 7 Cush. 72. * * *

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The judge of the Probate Court of Yazoo county *did not concur* with the High Court of Errors and Appeals as to General Miles' fee, *reversed* the decision of that tribunal, and disallowed the fee on the ground of "*public policy.*"

From this decree of the Probate Court of Yazoo county, Jones, Harvey et al., the executors of Dulaney, appealed, the High Court standing by its former decision in Noel *v.* Harvey, reversed the decree of the Yazoo court in so far as it had disallowed the fee of General Miles, and said there was no such "public policy." * * *

Second. The right of action of the complainants for $5,000 is barred by the Statute of Limitations of actions. * * *

But even were some of them not barred, barred by lapse of time — J. S. Harvey had been of age for more than sixteen years at the date of filing the bill, and it is well settled that when the cause of action is barred as to one it is barred as to all. Trawick *v.* Kelly, 60 Miss. 652; Tippin *v.* Coleman, 61 Miss. 516. * * *

In no possible state of this case have these complainants any right to recover any part of the $5,000 paid to General Miles. Their remedy alone for a wrongful payment of the money to General Miles was against the executors, in the Probate Court, on final settlement — a remedy of which they availed themselves, and failed. * * *

By the first and second paragraphs of the will full power and authority is given to the *executors* in the exercise of their *discretion* to sell any of the property, real or personal, of the testator, they should *think necessary* for the payment of the debts of the testator. * * *

By the terms of the will, the *judgment, belief, or opinion* of the executors as to the necessity of a sale is made the test of their power of sale, and the only limitation and restriction which the courts require in the exercise of this judgment, opinion, belief, or discretion are just such as the testator himself would require; that the discretion be exercised *in good faith free from fraud.*

However mistaken that judgment may be to the mind of the court, still if it be exercised honestly and in good faith, and be not in itself unreasonable, the courts will not attempt any interference with its exercise; much less will it interfere with the rights of third persons acquired in good faith, in reliance upon

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the exercise of the discretion. Perry on Trusts, vol. 2, § 511; Hill on Trustees, 489. * * *

COOPER, J., delivered the opinion of the court.

More than thirty years ago the right of Miles to the fee of $5,000 was conclusively settled by an allowance of the fee on the final settlement of the estate of W. Dulaney. By the will of Dulaney the executors were given power to sell either the lands or the personalty of the estate for the payment of the debts of the testator. There were debts, and the executors in the exercise of the discretion confided to them sold both lands and personalty. Under the power conferred the executors might have sold all the personalty and retained the lands, or sold all the lands and reserved the personalty, so far as was necessary for the payment of the debts of the testator.

The fact that Miles, whose claim arose under a contract with the executors, was paid from the sale of the lands instead of from the proceeds of the personal estate, and creditors of the testator were paid out of the personal estate, produced exactly the same result as would have followed a payment to him out of the personal estate, and payment to creditors of the testator out of the land sales.

We are not to be understood as deciding that the sale would not have been valid if there had been no other debt than that due to Miles.

Decree *affirmed*.

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THE CITIZENS' MUTUAL INSURANCE CO. et al. *v.* C. H. FOSTER et al., and G. W. FOSTER *v.* THE CITIZENS' MUTUAL INSURANCE CO. et al., and A. C. FOSTER *v.* THE CITIZENS' MUTUAL INSURANCE CO.

Creditor's Bill — Demurrer.

A creditor's bill filed by only a part of the creditors of the defendant is not obnoxious to a demurrer on the ground that the bill does not make all the creditors parties to the bill and such demurrer is properly overruled.[1]

The firm of Sims, Foster & Co., merchants, made a general assignment for the benefit of their creditors, in 1881, to Peter Stark, assignee. The assignment provided that the individual debts of the partners should first be paid out of the assets of the individual members of the firm and firm debts paid out of the firm assets, and any assets of the individual members remaining after paying the individual debts should be applied to the payment of the firm debts.

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Prior to act of January 26, 1898, only a creditor whose debt was due could invoke the remedy. Browne *v.* Hernshein, 71 Miss. 574.

Code of 1880, §§ 1843–1845, reads as follows:

"1843. The said courts shall have jurisdiction of bills exhibited by creditors, who have not obtained judgments at law, or having judgments, have not had executions returned unsatisfied, to set aside fraudulent conveyances of property, or other devices resorted to for the purpose of hindering, delaying, or defrauding creditors; and may subject the property to the satisfaction of the demands of such creditors, as if complainant had a judgment and execution thereon returned 'no property found.'

"1844. Upon such a writ of sequestration or injunction, or both, may be issued upon like terms and conditions as such, writs may be issued in other cases, and subject to such proceedings and provisions thereafter, as are applicable in other cases of such writs.

"1845. The creditor in such case shall have a lien upon the property described therein from the filing of his bill, except as against *bona fide* purchasers before the service of process upon the defendant in such bill."

Several complainants under different judgments against the same debtor may join in a creditor's bill seeking to set aside a fraudulent conveyance. Buckingham *v.* Walker, 51 Miss. 491.

The want of proper parties if apparent on the face of the bill may be taken advantage of by demurrer. Rodd *v.* Durbridge, 53 Miss. 694.

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Statement of the Case.

G. W. Foster, one of the partners, was employed by the assignee to aid in the collection of the assets. He collected some money and purchased with it some real estate, taking title in his own name. Stark, the assignee, filed several suits in chancery against him, seeking to subject that property to the payment of the firm debts of Sims, Foster & Co. These several suits were compromised and settled by Stark conveying the property to Mrs. C. H. Foster, wife of G. W. Foster, she agreeing to pay the assignee $6,000 cash and assume the individual debts of G. W. Foster, who owed W. R. Foster, J. C. Foster, and Mrs. A. C. Foster, and each of these held deeds of trust on the property conveyed to Mrs. C. H. Foster.

The Citizens' Mutual Insurance Company and some other creditors of Sims, Foster & Co., filed the bill in this case against G. W. Foster, Mrs. C. H. Foster, Mrs. A. C. Foster, W. R. Foster, and J. C. Foster, seeking to subject the property conveyed by Stark, the assignee, to the payment of their debts, alleging that the property was the individual property of G. W. Foster, and purchased and paid for by him from the assignee, taking the title in the name of his wife, Mrs. C. H. Foster; that the debts of Mrs. A. C. Foster, J. C. Foster, and W. R. Foster were fictitious, and that while the compromise by which the property was conveyed to Mrs. C. H. Foster by the assignee was in good faith, so far as he was concerned, yet, as between G. W. Foster and Mrs. C. H. Foster, it was fraudulent and intended to get the property in her name, and that G. W. Foster paid the consideration therefor.

The original bill alleged that G. W. Foster was a nonresident of the State, and prayed for an attachment against the property. G. W. Foster answered the bill, denying that he was a nonresident. The bill was then amended, omitting the attachment feature. Insurance Co. *v.* Foster.

G. W. Foster demurred to the bill, assigning as a ground of demurrer that the bill cannot be maintained as a creditor's bill, because all the creditors of Sims, Foster & Co. are not made parties, nor the bill drawn so that they can become parties. The demurrer was overruled, and G. W. Foster appeals from that decree.

Mrs. A. C. Foster filed a plea to the bill, setting up that in the suits filed against G. W. Foster et al. and herself that said assignee made all the charges and allegations against the validity of her

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trust deed, which complainants now make, and that the same solicitor represented him; that he knew as much about its invalidity as complainants know; that she answered that bill under oath, as she was legally bound to do, and that the bill was dismissed in open court at the cost of G. W. Foster, and was intended as a final settlement and adjudication of all matters in controversy and was as to her claim *res adjudicata* of the question of its validity. The court disallowed this plea, and Mrs. A. C. Foster appealed from that decree.

W. R. and J. C. Foster filed joint and several pleas, setting up the compromise and agreement with Stark, the assignee, in the chancery suits, and that it was made by said assignee representing complainants as creditors of Sims, Foster & Co., with a knowledge of all the facts and charges of fraud which complainants now make. They denied that their debts were fictitious. This plea was allowed by the court.

Mrs. C. H. Foster filed a plea, setting up the compromise, and alleging that she assumed all the individual debts of G. W. Foster as part consideration for her deed, and as to the further consideration of $6,000 cash, she answered, denying all fraud. This plea was allowed by the court.

The complainants appealed from the decrees allowing these pleas.

APPEALED from Chancery Court, Clay county, F. A. CRITZ, Chancellor.

Affirmed as to G. W. Foster. Reversed and remanded as to others, May 18, 1885.

Attorneys for appellants (*Insurance Co.*), *Fred & F. M. Beall* (*Fosters*), *Barry & Beckett.*

Attorneys for appellees (*Insurance Co.*), *Fred & F. M. Beall* (*C. H. Foster*), *Barry & Beckett.*

Brief of Insurance Company, Fred & F. M. Beall.

1. First we will take up the demurrer of G. W. Foster, and the order overruling same. This comes to this court upon the separate appeal of G. W. Foster.

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The bill as originally filed was a creditor's bill, and under the assumption that Foster resided in the State of Alabama, and was a nonresident, a prayer for an attachment against certain named property was inserted. Section 1832, Code 1880.

And at the same time, the full benefit of section 1843 was denied.

The two remedies are clearly not incompatible. But when Foster comes in and by his plea denied that he was a nonresident, and submitted himself personally to the jurisdiction of the court, the complainants, when they went to amend their bill, simply omitted the attachment feature. The case cited of Miazza *v.* Yerger, 53 Miss. 135, has no application at all. Clark *v.* Hull, 31 Miss. —.

The essential character of the original bill in this case was a creditor's bill; that character is fully retained in the amended bill. * * *

The other point made by counsel for G. W. Foster is that the bill cannot be maintained as a creditor's bill, because all the creditors of Foster are not made parties, nor the bill drawn so that they can become parties. The bill, both original and amended bill, is filed under sections 1843 to 1845 inclusive, Code 1880.

In other words, the proceeding is statutory — it is just such a bill as the complainants could have filed if they now had judgments against Foster, and judgment liens on his property. * * *

But this question cannot be served by demurrer any way, for there is nothing in the bill to show that there are any other creditors. It must first be made to appear by a proper pleading that there are other creditors before this question can be raised. * * *

The ground of demurrer that Stark, the assignee, was not made a party was neither relied on in the court below, nor is it relied on in this court by counsel for Foster. The above are the only two points relied on by him.

It will be observed that Foster filed no answer denying the fraud charged against him in the bill. * * *

The whole gist of the bill is fraud, and Foster is the main actor in this fraud, the grand schemer and originator of all the fraud, and yet he makes no answer to the fraud charged. We can see no legal reason why the general rule, which requires the fraud charged to be assured, should not apply in this case, if the fraud is properly pleaded, as we think it is. * * *

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Second. We deduce from the authorities the following rules which we invoke:

1. A plea in bar, if it does not go to the whole bill, must express to what part of the bill the defendant pleads. And if the parts of the bill to which the plea extends are not definitely expressed, the plea is bad and should be overruled.

2. The plea should reduce the case to a single issue, and that issue should be a material issue.

3. The plea should clearly and distinctly aver all the facts necessary to render the plea a complete equitable defense to the bill, so far as the plea is intended to extend. 1 Daniel Chancery Pleading and Practice, 608 *et seq.;* Story's Equity Pleading, § 659 *et seq.*

Tested by these plain elementary rules, we think the plea is bad, and should have been so held. * * *

The bill charges against this defendant fraud, collusion, and guile. Such charges are required to be denied clearly in the plea, as well as in the answer. Story's Pleading, §§ 684, 685; 1 Daniel Pleading and Practice, 611.

If any part of the defense attempted to be made by a person is bad, the whole must be overruled. 1 Daniel, 611, 612. * * *

This plea sets up the compromise made by Foster with Stark, assignee, and pleads it in bar to the amended bill so far as the same seeks to set aside the trust deeds of A. C. Foster, W. R. Foster, and J. C. Foster. * * *

These creditors were not parties to the litigation, nor the disputes between Foster and Stark; they knew nothing of these matters. They had nothing whatever to do in the making of the deed whereby Stark was made the assignee, and whether or not the creditors of Foster are bound by the acts of Stark depends upon whether they ever agreed to be so bound. Kerrison, Assignee *v.* Stewart et al., 93 U. S. 155; Bigelow on Estoppel, 82 *et seq.*, 98 and note 5; Champion *v.* Cayee, 54 Miss. 695; Yandell *v.* Pugh, 53 Miss. 295; McPike *v.* Wells, 54 Miss. 136.

If Stark had been chosen assignee by the creditor of Foster, or mutually by the creditors and debtors, then he could have barred the creditors, not otherwise. * * *

I do not dispute the proposition that the compromise of a disputed claim is a valid contract, provided it is free of fraud or mistake.

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That is not the question here — it is, was Stark, the assignee, empowered to compromise the claim and demand of the creditors. * * *

But it is said we do not charge any fraud against Stark in making that compromise. We reply that Stark is a volunteer; he is not our guardian; he holds his position alone upon the authority of Foster. He is Foster's chosen assignee, not our respresentative. * * *

It does not even appear that the creditors ever accepted any benefit under the assignment, that any money was ever paid them by the assignee, and the fact is, they never did. We have nothing at all to do with the assignment. We are simply creditors of Foster, seeking to collect our debt, and to that end, to subject whatever property we find in his possession. * * *

What has been said in reference to the plea of Mrs. C. H. Foster will in the main apply to the plea of W. R. Foster and J. C. Foster, which was also held good by the court below. * * *

It is a rule of equity pleading, that whenever matters of fact are introduced in the bill, which, if true, would destroy the effect of the matter pleaded, the plea will be overruled. I Daniel Chancery Pleading and Practice, 613; Id. 624, 625.

The bill charges that Foster obtained the compromise by fraud, that he actually forced it out of Stark by a system of fraudulent acts, and that his wife, son, sister, and cousin aided him in all this.

Third. The plea of Mrs. A. C. Foster was overruled by the court and she appeals therefrom. This plea is found on page 152.

This plea sets up the dismissal of the suits instituted by Stark, assignee, against Foster as *res adjudicata* of the questions of the validity of her claim against Foster.

There was in fact no adjudication of this, or any other question in these suits. The suits were settled by compromise, the agreement of compromise reduced to writing, and made of record, and then the cases were dismissed at Foster's costs, but even if there had been an adjudication in those suits, the complainants in this suit were not parties to that litigation. There must have been an actual adjudication, a determination in fact, by the court, so say all the authorities. I Daniel Chancery Pleading and Practice, 659 *et seq.*; Arden *v.* Patterson, 5 Johns. Ch. 44; Story's Equity Pleading, § 793.

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Brief of C. H. Foster et al., Barry & Beckett:

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There is then but a single question presented by the plea of J. C. Foster, and that is, is the compromise of a disputed claim valid.

It is held that an assignee or trustee may make in good faith a valid compromise of a disputed claim. Long *v.* Shackleford, 25 Miss. 559, 567; Berry *v.* Parks, 3 S. & M. 638–640; Perry, Trusts, §§ 185 and 482.

Compromise of a disputed claim is a valid contract. 56 Miss. 537; 57 Miss. 738; 56 Miss. 508, 509; 52 Miss. 494–497; 50 Miss. 258, 259; 41 Miss. 712–716; 28 Miss. 69; 6 Wait's Actions & Defenses, 696, 697, § 8; 1 Story's Equity Jurisprudence, §§ 121, 130, 131, 131a, and 131, note 5.

In our later decisions, it is held that in order to make a compromise of a disputed claim valid, there must be something due, and it must not be a purely fictitious claim. 55 Miss. 77; 58 Miss. 822; 59 Miss. 45.

The plea conforms to these decisions by denying that the debt and trust deed were fictitious. It shows that if there was any fraud, that the assignee knew as much about it as complainant, now, and that it was in fact the issue involved, and our court holds that it is competent to compromise fraud, as anything else, where there is good faith. Bass *v.* Nelms, 56 Miss. 508, 509.

All that is necessary is that the assignee act in good faith, and this is expressly admitted in the bill.

There is also but a single point presented by the plea of Mrs. C. H. Foster, and that is, is she bound by the compromise deed.

It is useless to refer to authorities on this point. She signed the deed and agreement, and holds the property under it. * * *

With her, it is not a question of whether the debts were fictitious or not. She agreed to do certain things as a consideration for the land, and she is estopped to inquire into whether these debts were fictitious or not. * * *

We have not referred to authorities to sustain the form of the pleas in this cause, because no attack has ever been made on the forms of them so far as we know, except that in the argument of the sufficiency of a plea, complainants complain that they have a right to open and conclude the argument, while the pleader in each case claimed and was accorded that right by the court below,

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and complainants excepted. Of course this would be no ground for reversing a case in chancery tried by a chancellor without a jury, but we also desire the court to express an opinion as to the correct practice. The only authority we have been able to find announces that the defendant has this right, and the court below acted on that. 1 Daniel Ch. Pleading and Practice, 694.

The demurrer, plea, and answer of Mrs. C. H. Foster is found in 3 Daniell Ch. Pleading and Practice, 2088.

There is no answer in support of the plea of W. R. and J. Collier Foster. It is a joint and several plea in the prescribed form. 1 Daniell Ch. Pleading and Practice, 681.

An answer in support of a plea is only required where the frauds charged in the bill, if true, would overrule the plea, and as we have shown, it was the very alleged frauds which were compromised. I Daniel Ch. Pleading and Practice, 625; Story's Equity Pleadings, §§ 681 and 615; Bass *v.* Adams, 56 Miss. 508, 509.

And an answer in support of a plea being required under oath as to those matters in which the party is specially interrogated is never required in any case where the defendant is not specially interrogated. I Daniel Ch. Pleading and Practice, 615, 616; Story's Equity Pleadings, § 682.

And besides, where an answer under oath is waived, it can neither be compelled, nor excepted to. Story's Equity Pleadings (8 ed.), § 875a, bottom of note 6, p. 742.

Brief of G. W. Foster, Barry & Beckett:

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The first point is, can an attachment suit in chancery be amended into a statutory creditor's bill?

Second. Can a statutory creditor's bill be maintained by a part of the creditors, or must it be on behalf of all, or all be made parties?

First, it is said, that a party cannot, by an amended bill, change the structure and essential character of his suit, and if he attempt to do so the amended bill will be demurrable. Miazza *v.* Yerger, 53 Miss. 135.

There are many points of difference between an attachment in chancery and the statutory creditor's bill. First, in the attachment, it is not necessary that there should be a fraudulent conveyance, as the attachment of the property is to gain jurisdiction

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against a *nonresident* or absent or absconding debtor, but of course a fraudulent conveyance will not stand in the way of the attachment, either at law or in equity. Code of 1880, § 1832.

Second. In the attachment suit the land may be levied on. Code of 1880, § 1899.

Writs of sequestration may be levied on general property. Section 1900.

Garnishment may be issued for debtors. Sections 1832, 1898.

Under the statutory creditor's bill neither an attachment nor garnishment can issue. The only writs are those of sequestration and injunction. Code of 1880, §§ 1843, 1844.

Third. In the one case the lien commences on the levy of the writs. Sections 1898, 1902. In the other the lien commences from the filing of the bill. Section 1845. * * *

But it may be said that there are enough statements in the original bill to have made it a pure creditor's bill in the first instance, but we have shown that fraudulent conveyances are no objection to an attachment bill, and that the bill was actually filed as an attachment bill. It expressly asks its relief under Code of 1880, §§ 1832, 1898, 1902.

And attachments and garnishments were actually issued, levied, and served. What is to become of these?

The same point was made in Miazza *v.* Yerger, 53 Miss. In that case it was a bill to establish a trust in real estate, and "there were also enough allegations in the bill to show that complainant had a dower interest," and "there was also a prayer for relief as to this dower interest." 53 Miss. 136.

And yet when complainant, on the sustaining of a demurrer to the original bill, attempted to amend to a bill in regard to this dower interest, it was not allowed. Miazza *v.* Yerger, 53 Miss. 136, 140; Story on Equity Pleadings, § 312.

Second. Should the statutory creditor's bill be filed on behalf of all such creditors as choose to come in and contribute to the expenses?

It is held that where property paid for by the husband is conveyed to his wife (as is alleged in this case), it may be reached in equity without a previous judgment and execution. Case *v.* Beauregard, 101 U. S. 690, 691.

And in many of the States it is held, without any statute, that a judgment and execution at law is not necessary to enable a

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creditor to sustain a bill to vacate fraudulent conveyances. They are collated in Case *v.* Beauregard, 101 U. S. 690. * * *

There is no answer denying the fraud in this case, because, first, it is not a general demurrer. Story on Equity Pleadings, § 455, and notes 2, 3; Barton's Suit in Equity, 107, 108. And, second, the charge of fraud, even if true, would not affect these grounds of demurrer. 15 Miss. (7 S. & M.) 456; 21 Miss. 793; 41 Miss. 460; 41 Miss. 712; 6 How. (7 Miss.) 311; Story on Equity Pleadings, § 465.

Brief of A. C. Foster, Barry & Beckett:

* * * * * * * * * * * *

To render a former decree at bar it is not essential that the party should be named in the former suit, if his rights were there represented. Story on Equity Pleadings, § 783 (b). * * *

It is laid down as the universal rule that a judgment or decree for or against an assignee, in regard to the assigned property, where he represents the creditors, is, in the absence of fraud and collusion between him and the defendant, binding on the creditors. Kerrison *v.* Stewart, 93 U. S. 155; Perry on Trusts, § 15; Edrington *v.* Jefferson, 111 U. S. 774; Ashton *v.* Atlantic Bank, 3 Allen, 219, 220. * * *

The suits we have referred to have reference to the trust property in the possession of the trustee, and hence are in the nature of proceedings *in rem* which bind the beneficiaries and all the world, as is also the nature of the case at bar.

It is distinctly stated in the bill that the assignee acted in the suit *in good faith*. So there was no collusion on his part. * * *

It is a general rule that a party cannot take so much of a contract as is beneficial to him and reject the remainder, but he must accept or reject all. The creditors then must accept the compromise as made for them by the assignee, or reject it entirely. We do not deny that they may show that the $6,000 and any other consideration was actually paid by G. W. Foster, but we do deny that they can show the consideration was different from that expressed in the compromise deed, or that it was not an adequate consideration. They can show that G. W. Foster is the real owner of the property, but they cannot show that the grantee, whether it be her or Mrs. C. H. Foster, was not to pay the con-

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sideration expressed in their deed, made for them by their assignee. * * *

The plea is sworn to, though that is not required in pleading a former decree. Story on Equity Pleadings, §§ 696, 700.

It is not accompanied by any answer denying the fraud, because, first, Mrs. A. C. Foster is not interrogated as to any fraud. Story on Equity Pleadings, § 682; 1 Daniell on Chancery Pleading and Practice, 615, 660, 661.

Second. Because the charges of fraud were the issue in the former suit, and an answer would overrule the plea. Story on Equity Pleadings, §§ 681, 688.

Third. The bill waives an answer under oath, and the object of the answer is to put the defendant on his oath. Story on Equity Pleadings, §§ 672, 673.

OPINION.— PER CURIAM.

We affirm the decree overruling the demurrer of G. W. Foster to the amended bill, and forasmuch as the pleas may be a good defense, and yet there may be matter disclosed in evidence which, even if the pleas are true, may avoid them, in order not to preclude the complainant by allowing the pleas, we reverse the decrees allowing the plea of C. H. Foster and that of W. R. and J. C. Foster, and disallowing the plea of A. C. Foster, and direct a decree saving the benefit of the said several pleas to the several defendants at the hearing, and the cause is now remanded for further proceedings in the Chancery Court.

Costs here are to be divided, except that the $50 attorney's fee shall be taxed to G. W. Foster, as provided by section 1424 of the Code.

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MARGARET E. MITCHELL *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Negligence — Peremptory Instruction.

Where, in a suit against a Railroad Company for damages for destruction of property by fire alleged to have been caused by sparks from defendant's locomotive, and there was proof by plaintiff that the fire could have been extinguished by the defendant's employees, the jury should be permitted to say whether negligence was imputable to defendant because of failure of its employees to endeavor to extinguish the fire, and a peremptory instruction for defendant was erroneous.[1]

Suit by Margaret E. Mitchell against the Louisville & Nashville Railroad Company for damages for destruction of fences, grass, and trees, alleged to have been caused by sparks from a locomotive of defendant. The court below gave peremptory instruc-

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The railroad must show facts to exonerate itself if it be shown that injury was inflicted by the running of its locomotives or cars. It cannot rely on presumptions or conjectures. Vicksburg R. Co. *v.* Hamilton, 62 Miss. 503; Kansas City R. Co. *v.* Doggett, 67 Miss. 250.

Court may direct a verdict for defendant if the plaintiff makes out only a *prima facie* case under the statute, and the company by undisputed evidence shows that its servants did everything possible to prevent the injury. Dedford *v.* Louisville R. Co., 65 Miss. 385.

Proof that a fire was started by the escape of live sparks from a railroad locomotive, causing damage to plaintiff, makes a *prima facie* case under § 1059, Code of 1880, and § 1808, Code of 1892. A. & V. R. Co. *v.* Barrett, 78 Miss. 432.

In a suit against a railroad company for damages caused by fire, if it be shown that the fire was started by sparks escaping from a locomotive, in the service of the company, the burden of proof is on the defendant to meet the *prima facie* case arising under § 1059, Code of 1880, and § 1808, Code of 1892. Drake *v.* Railroad Co., 79 Miss. 84.

Damage by fire is within § 1808, Code of 1892. Mobile R. Co. *v.* Gray, 62 Miss. 383; Louisville R. Co. *v.* Natchez R. Co., 67 Miss. 399.

In a suit against a railroad company for damage by fire communicated by its running train, it is proper to refuse instructions which impose on plaintiff the burden of showing negligence on the part of defendant, and also that plaintiff hmself was free from negligence. Louisville R. Co. *v.* Natchez R. Co., 67 Miss. 399.

A railroad company is under no duty to contiguous owners to stop its train to extinguish fires which without its fault or negligence are set out by the locomotive. Insurance Co. *v.* Railroad Co., 70 Miss. 119.

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tion for defendant, whereupon the plaintiff appealed to the Supreme Court.

APPEALED from Circuit Court, Harrison county, S. H. TERRALL, Judge.

Reversed and new trial awarded, March 15, 1886.

Attorneys for appellant, Posey & Bowers.

Attorneys for appellee, Gaylord B. Clark & Le Vert Clark.

Brief of Posey & Bowers:

* * * * * * * * * * * *

The question presented by the assignments of error, and relied upon by appellant, is that the plaintiff below made out such a case as should have gone to the jury.

The negligence of the defendants, as relied upon by plaintiff, consisted:

First. In the failure to provide its locomotives with proper spark arresters.

Second. The failure to remove the dry grass and leaves from its track and right of way, when warned by an unusually dry season and by frequent fires that prudence demanded its removal.

Third. The failure to detail its available force at hand, to extinguish the fire, after its origin was known to them. * * *

Among precautions proper to be taken, and we may say required to be taken, is the removal of grass and other combustible matter from its track and right of way; and "while this failure on the part of the railroad may not, in the strictest sense, be termed *negligence per se,* it is nevertheless evidence of negligence proper to be submitted to the jury; and it is for the jury to say whether, from all the facts in the case, it was negligence on the part of the railroad to leave such combustible material so exposed, whether in heaps or in a natural state." Pierce on Railroads, 431, and cases there cited.

We submit that upon this point alone the evidence was such as should have been submitted to the jury, to be passed upon by them, and the weight of this proof is increased by the consideration of the fact that the defendant was warned by frequent fires in the same locality that the presence of this dry and dead material endangered the neighboring fences and trees.

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The failure of the section boss to detail his available force to assist in extinguishing the fire is another circumstance importing on its face negligence on the part of the defendant. * * *

It is true that he (the section boss) testified that he could not leave his track, but that only raised a conflict, and it should all the more have been left to the jury, in order that they might decide whether or not his occupation at the time was such as to justify him in his failure to send his whole force to combat the flames. It was his duty to have done so. The obligation resting upon him is clear. *Vide* Pierce on Railroads, 438, note 5, and cases cited; Bass *v.* C., B. & Q. R., 28 Ill. 9–18. * * *

When the plaintiff proved her loss, she made out a *prima facie* case and the burden then rested upon the defendant to prove that no fault could be imputed to it. * * *

It is for the jury to determine, as questions of fact, whether the company caused the fire; and if so whether it was caused by the negligent construction or management of its engines. * * *

Brief of G. B. & L. V. Clark.

* * * The failure of the company to supply adequate and proper machinery is corporate negligence as distinguished from the negligence of the company's servants, as evidenced by the unskillful, careless, or negligent performance of their duties in the management of the machinery put into their hands by the corporation. Railroad Co. *v.* Thomas, 42 Ala. 672, 715; Railroad Co. *v.* Smith, 49 Ala. 245.

A railroad company is not responsible for fires occurring from sparks thrown by their locomotives, unless they have been guilty of some negligence. Atchison, Topeka & Santa Fe R. *v.* Riggs, 15 Am. & Eng. R. Cas. 531; Hoff *v.* Railroad Co., 13 Am. & Eng. R. Cas. 476; Brown *v.* Atlantic & C. R., 13 Am. & Eng. R. Cas. 479, and note, 487; Railroad Co. *v.* McBrowns, 13 Am. & Eng. R. Cas. 450, 458; Railroad Co. *v.* Spence, 11 Am. & Eng. R. Cas. 60.

The fact that fire was discovered shortly after passage of train raises no presumption, and it is not evidence that the same was kindled by sparks. 7 Am. & Eng. R. Cas. 501; 2 Am. & Eng. R. Cas. 267.

A railroad company is not bound to preserve property of others at the risk of human life. Railroad Co. *v.* Jones, 59 Miss. 465.

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The burden of proof is on the plaintiff to show that the injury was imputable to the negligence or misconduct of defendant or its agents. Railroad Co. *v.* Gray, 62 Miss. 383. * * *

If the fire be attributable to the escape of sparks from the locomotive, the proof shows conclusively, and without contradiction in the testimony, that the company had met the full measure of its duty in the premises and was free from the negligence charged.

The appliances for the prevention of such accidents were the best of the kind in use or known to the railroad profession. The arresters were effective enough to detain 90 per cent. of the sparks, including all of the large ones, which, in the aggregate, amounted to twenty-four bushels in a single trip from Mobile to New Orleans. It was impossible to retain all without practically closing the draft of the furnace and thus preventing the generation of steam.

There is absolutely no proof to show negligence on the part of the engineer and fireman in the management of the locomotive. A question was asked as to whether the company had stoves in the cars. The charge in the declaration is that the fire was set by sparks from a defective locomotive and not from a stove, and the *allegata* and *probata* must correspond. But aside from this, there is no proof that there was any fire in the stoves on that morning.

As to the alleged negligence in not putting out the fire after it had caught from some source, the proof clearly shows that when it was discovered the section boss and men were a mile off and had no knowledge of the danger or condition of affairs, and that when such knowledge was obtained it was too late to do any good. Moreover, the uncontradicted evidence is that when the section boss discovered the fire his track was not in a safe condition to leave, nor could it have been put in condition with less than a half hour's work. Trains might be expected at any time. The law does not require the servants of a railroad company to do anything for the mere preservation of property, if thereby human life is endangered.

OPINION.—CAMPBELL, J.:

The jury should have been permitted to pass on the question whether negligence was imputable to the defendant because of the failure of its employees to make an effort to extinguish the fire.

Reversed and remanded for a new trial.

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VICKSBURG & MERIDIAN RAILROAD COMPANY *v.* F. J. SHARKEY.

Verdict — Preponderance of Proof — Common Carriers — Contracts.

In a suit for the value of a mule alleged to have been killed by the careless unloading of a car of mules by a defendant Railroad Company, where the preponderance of proof showed that the injury occurred by reason of the fault of the animal and not of the carrier, and where, further, such injury arose from a cause which, by contract of shipment, relieved the carrier from liability, the verdict and judgment should be for the carrier.[1]

Suit by F. J. Sharkey for $140 for value of one mule alleged to have been killed by defendant's carelessness in unloading a car of mules at Vicksburg.

The mules were delivered by appellee to the St. Louis & Cairo Short Line at Cairo, Ill., on February 13, 1885, for transportation to, and delivery at Vicksburg. The Illinois Central Railroad,

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Section 1059, Code of 1880, and § 1808, Code of 1892, making proof of injury inflicted by the running of the locomotives or cars of such company *prima facie* evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury does not apply to causes of action arising *ex contractu*. Railroad Co. *v.* Trotter, 60 Miss. 442.

The railroad must show facts to exonerate itself if it be shown that injury was inflicted by the running of its locomotive or cars. It cannot rely on presumptions or conjectures. Vicksburg Railroad Co. *v.* Hamilton, 62 Miss. 503; Kansas City Railroad Co. *v.* Doggett, 67 Miss. 250.

Court may direct a verdict for defendant if the plaintiff makes out a *prima facie* case only under the statute, and the company by undisputed evidence shows that its servants did everything possible to prevent the injury. Dedford *v.* Louisville Railroad Co., 65 Miss. 385.

The carrier is not liable for injury inflicted by an animal upon itself, or caused by other animals with which it is being shipped in the same car, if the injury results from no fault of the carrier. Railroad Co. *v.* Scruggs, 69 Miss. 418.

A common carrier of live stock may by special contract stipulate for immunity from liability for injuries caused by the animals being wild, unruly, weak, or of different sizes or classes, maiming each other or themselves. Railroad Co. *v.* Scruggs, 69 Miss. 418.

The burden of proof is upon a common carrier claiming exemption from liability for injuries to goods under a special contract, to show that the damage resulted from one or more of the excepted causes in the contract and without its fault. Railroad Co. *v.* Abels, 60 Miss. 1017; Johnson *v.* Railway Co., 69 Miss. 191.

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one of the corporations composing the Cairo Short Line, delivered the mules to the Vicksburg & Meridan Railroad at Jackson, Miss., for delivery at Vicksburg.

Preponderance of proof showed that two night watchmen of appellant made an examination of the car in which the twenty-one mules were received at Vicksburg, at half-past two o'clock in the morning, and that they found that one mule had kicked his hind foot through the slat work of the car about five feet from the bottom, and was hung up by its foot, its body being down in the car and the other mules were trampling upon it. These men procured a saw and hatchet and cut out the slat, which was of firm white oak, and let the mule's foot and leg down. One large black mule was standing on its flank. The place where the mule had kicked through was an opening three inches by five inches, where the outside slanting bars cross the slats. The car belonged to the Illinois Central Railroad Company, and was built as stock cars usually are. There was no hasp on the car door that could have caused the death of the mule, as contended by appellee. There was a clause in the contract of shipment that the company should not be held responsible for injuries to the mules if such injuries were caused by any act of the mules themselves. The car in which the mules were shipped was selected by appellee at Cairo, and was the same car in which the mules arrived at Vicksburg.

The testimony of plaintiff, in rebuttal of defendant's proof as to cause of death, consisted, in the opinion of some witnesses, that the injury might have been caused by the hasp of the car door, if there had been such hasp (but the testimony of defendant, which was all there was on this point, was that there was no such hasp on the car door), and the opinion of two other witnesses that the injury could not have been inflicted as the witnesses of defendant said it was.

There was verdict and judgment for plaintiff, whereupon the defendant appealed to the Supreme Court.

APPEALED from Circuit Court, Warren county, RALPH NORTH, Judge.

Reversed and remanded, April 12, 1886.

Attorneys for appellant, Nugent & McWillie.

Attorneys for appellee, Miller, Smith & Hirsh.

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Brief of Nugent & McWillie:

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The railroad companies in this case were private carriers, and the special contract must determine the liabilities and rights of the parties. The identical agreement was construed and upheld by the court in Railroad Co. *v.* Henlein & Barr, 19 Am. Ry. Rep. 200 and in Penn. *v.* Rrailroad Co., 49 N. Y. 204, and Cragin *v.* Railroad Co., 51 N. Y. 61. In this case the burden of proof was upon the owner to prove negligence before he could impose a liability upon the carrier. Clark *v.* Railroad Co., 17 Am. Ry. Rep. 284. The statute as to evidence could not be invoked to aid the recovery. Now the mules were loaded at St. Louis and unloaded by the owner or shipper at Cairo, and placed by him in a stock car of the Illinois Central Railroad Company. From this car they were not removed until some hours after their arrival at Vicksburg, and then only in the effort to save the appellee from loss. The declaration alleges that the Illinois Central Railroad Company, in furtherance of the understanding, delivered the mules at Jackson to the appellant company, and thereupon it became the duty of the appellant to transport and deliver the mules to Vicksburg. The mules were not unloaded at Jackson and placed in one of appellant's cars, but, being in charge of the owner's agent, the car containing them was switched onto the track of appellant and attached to its train. It is clear, therefore, that the receipt of the mules by appellant under these circumstances imposed upon it the sole duty of carrying the car and its contents to Vicksburg. As it was tendered to them by the owner, so they received it, and they had the right to suppose and believe it to be a proper car. This is considered a sufficient answer to the suggestion that the car was defectively constructed, either as to the slats surrounding it, or the door fastening. If such defects existed the plaintiff below failed to show that the appellant company was aware of the fact. Ill. Cent. R. Co. *v.* Hall, 11 Am. Ry. Rep. 95; Squire and Others *v.* Railroad Co., 98 Mass. 244; 2 Rorer on Railroads, 1307. * * *

There could hardly be a doubt in the mind of any one as to the cause of the injury to the mule. There were three witnesses for the company, two of whom saw the mule in the car down and being trampled to death by the other mules. Bruner and Sanders, night watchmen at the company's yard in Vicksburg, at 2:30 o'clock

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in the morning, on examination of the car, found that one mule had "kicked his hind foot through the slat work of the car about five feet from the bottom, and was hung up by his foot, its body being down in the car and the other mules were trampling it." These men got a saw and hatchet, and sawed out the slat, which was of firm white oak, and let the mule's foot and leg down. One large black mule was standing on its flank. The place where the mule had kicked through was an opening three inches by five inches, where the outside slanting bars cross the slats. The car belonged to the Illinois Central Railroad Company and was built as stock cars usually are. There was no hasp on the car door that could have injured the animal; the fastening was down at the bottom of the door. The mule was not hurt by any hasp or anything else about the car. The slats were made of good solid white oak, and the mules were all right when they came into the station at Vicksburg that night. These statements are made by two eye-witnesses of the transaction, and ought to have been credited. * * *

But the case was wholly misconceived by the court. The carrier had conveyed the mules safely to Vicksburg and they were all right when they reached the company's yards. There was no fraud or gross negligence shown. The mules were in a car of the Illinois Central Railroad Company, properly constructed, and one, too, selected by the owner or shipper at Cairo. The yards were guarded by night watchmen, and every caution taken to guard against accidents. There can, I think, be no doubt as to the cause of the injury. The mules were crowded in the car and, doubtless, had become leg weary and restive when the car was stopped at Vicksburg. In this condition it is not unlikely that, for some cause or other, the injured mule kicked at the slats and got hung. Falling down, as he necessarily would, the other mules tramped upon him and injured him. It was against precisely this sort of injury that the contract provided, and the court should have charged the jury to find for the defendant below.

Brief for appellee not found in the record.

OPINION.—COOPER, C. J.:

The defendant has given a reasonable and, if true, a sufficient explanation of the cause of the injury to the mule of the appellee. It has assumed the burden devolved upon it by law, and shown

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that the injury occurred by reason of the fault of the animal and not of the carrier, and having thus shown it to have arisen from a cause as which by its contract it was relieved from liability by the contract of shipment, without fault on its part, it made a *prima facie* case which entitled it to verdict until overthrown by other evidence. The whole testimony for the plaintiff in rebuttal of the defense thus established consists, in the opinion of some witnesses, that the injury might have been inflicted by the hasp of the car door if there had been such hasp (the testimony for the defendant, which was all there was on this subject, was that there was no such hasp on the door), and the opinion of two witnesses that the injury could not have been inflicted as the witnesses of the defendant say it was. In the latter opinion the witnesses for the plaintiff differ, one saying it might have been so inflicted, and the other that it might not.

The verdict is against the manifest preponderance of the testimony, and it is

Reversed, and a new trial is awarded.

JOHN R. RAY *v.* JAMES PATRICK.

Malicious Prosecution — What Constitutes.

To maintain an action for malicious prosecution it is necessary to prove both malice and want of probable cause.[1]

Same — Instructions.

In an action for malicious prosecution where the facts are shown in evidence, it is error to instruct the jury that the acquittal by the court before which the plaintiff was tried and acquitted was *prima facie* evidence of want of probable cause.

This was an action by appellee against appellant to recover damages for a malicious prosecution instituted against him by appellant and causing him to be arrested and tried on a charge of larceny

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Want of probable cause is not alone sufficient to maintain an action for a malicious prosecution. Plaintiff must also show that the defendant acted from malice, although the prosecutor had no probable cause for instituting the prosecution yet, if he thought he had, he is not liable for an

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in stealing hogs. From a verdict and judgment for plaintiff for $200, defendant appeals. Reversed and remanded.

The court gave the following instructions for plaintiff over the objection of defendant:

"First. The court instructs the jury that if they believe from the evidence that the plaintiff, J. M. Patrick, had, at and before the date of the affidavit and warrant made by defendant, Ray, upon which plaintiff was arrested, tried, and acquitted of the charge of grand larceny, a claim of wild hogs in the country adjacent to the home of defendant, Ray, and which was well known to defendant before the institution of the prosecution by him against Patrick, and if they further believe that J. M. Patrick caught and killed or sold hogs so running wild and unmarked in said range, believing that he had a valid claim upon them, and which was also known to Ray before said prosecution, then such a state of facts did not constitute larceny, and if the jury believe such to have been the facts of the case, then the law is that Ray is presumed to have known that Patrick was not guilty of larceny, and should find for plaintiff.

"Fifth. If the jury believe from the evidence that Ray made one or more affidavits charging Patrick with the crime of larceny and had a warrant issued for his arrest on said charge by a justice of the peace of Tippah county, and if they further believe that said Patrick was thereafter acquitted by the court before whom he was tried, then such acquittal is *prima facie* evidence of the want of probable cause for the prosecution, and will authorize the jury to find for the plaintiff unless overcome by testimony.

"Eighth. The court instructs the jury that mere good faith in making the accusation of larceny against Patrick by the defendant, without probable cause, is not a sufficient defense, nor his mere belief that he had good cause for commencing criminal proceedings, without probable cause of all the facts and circumstances under which he acted clearly shows that there was no probable cause for his prosecution and that his belief was groundless and

honest mistake of judgment. Greenwade *v.* Mills, 31 Miss. 464; Whitfield *v.* Westbrook, 40 Miss. 311.

The question of probable cause is a mixed proposition of law and fact. Greenwade *v.* Mills, 31 Miss. 464; Whitfield *v.* Westbrook, 40 Miss. 311; McNulty *v.* Walker, 64 Miss. 198.

The defendant is justified if the evidence is sufficient to induce the belief of the guilt of the accused. Insurance Co. *v.* Williams, 60 Miss. 916.

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could not have been formed without the grossest ignorance and negligence, and if the jury believes from the evidence that no probable cause existed and the defendant, Ray, failed to use such prosecution as a prudent and discreet man would use it to ascertain that fact, although he acted entirely without malice, they will find for plaintiff."

Defendant's motion for a new trial was overruled, and he appeals.

APPEALED from Circuit Court, Third District, Tippah county.

Reversed and remanded, May 25, 1885.

Attorneys for appellant, Thurmond & Harris, B. F. Worsham, J. W. C. Watson.

Attorneys for appellee, Faulkner & Frederick.

Brief of J. W. C. Watson:

The testimony establishes probable cause for the prosecution in the premises.

The first charge given by the court for Patrick is manifestly erroneous. This charge has no relation to the hogs, for the stealing of which they prosecuted Patrick. Every word said in his charge about hogs may be true, and still Patrick guilty of having stolen Ray's hogs, as charged by Ray in the affidavit he made as the foundation of a prosecution he instituted against Patrick. By his affidavit Ray charges Patrick with having stolen from him "on or about the 10th of February, 1884, swine that did belong to him, Ray, two black, one with little white about the breast, two sows, are marked with split in left ear, black and white spotted, six shoats, black and white spotted, one spotted sow and three black and white spotted." Now here is a specified charge he has given, and the hogs described as to number, flesh-marks, etc. It may be true that Patrick did catch and kill or sell hogs running at large in the range, believing that they belonged to him, and still it may also be true that he was guilty as charged in this affidavit. This first instruction of the court should have connected itself with the specific charge made by Ray against Patrick. But it does not, and is, therefore, error in this particular.

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The third charge for plaintiff is erroneous in this: It does not restrict the jury to their belief founded upon the evidence. Where this charge says "and if the jury believes that defendant, Ray, rashly, wantonly, or wickedly trumped up the charge of larceny against Patrick out of weak and flimsy material," etc., they should have been told "if, from the evidence, they believed," etc. This charge also at the very outset implies that the defendant, Ray, "blindly and inconsiderately believed that there was reasonable grounds for the prosecution." The language is calculated to have misled the jury as to what the court believed. In still another particular this charge is erroneous. It concludes by telling the jury that "if there is a want of reasonable cause for the prosecution, they must find for the plaintiff," excluding thereby malice as an indispensable ingredient in the cause of action.

The fourth charge given for the plaintiff is erroneous in virtually making the want of probable cause conclusive evidence of malice. "The want of probable cause is not even *prima facie* evidence of malice." Whitfield *v.* Westbrook, 40 Miss. 318.

The fifth charge for plaintiff below erroneously made the acquittal by the justice *prima facie* evidence of the want of probable cause. The language is, "It is *prima facie* evidence of the want of probable cause and will authorize the jury to find for the plaintiff unless overcome by testimony." The law is that "the want of probable cause is not *prima facie* evidence of malice, by which a jury is bound until the contrary is proved. It is a presumption for the consideration of the jury, and to be decided by them consistent with truth and justice." 40 Miss. 318, 319.

The eighth charge for plaintiff below is erroneous, "because it left the question of probable cause to the jury entirely." 40 Miss. 316, 317.

The ninth charge for the plaintiff is erroneous, because it directed the jury to find for the plaintiff on a state of facts which might have shown probable cause and the total want of malice. If such is the law, "It will have the effect to discourage all prosecutions of real or supposed criminals by private persons." 60 Miss. 923.

The court further erred in this case by giving contradictory charges. Several of plaintiff's charges direct a verdict for him without making malice a condition precedent to suit pending, and then in defendant's charges, making malice a condition precedent.

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The law of this case is so fully presented in the cases of Planters' Ins. Co. *v.* C. H. Williams, 60 Miss. 916, and Whitfield *v.* Westbrook, 40 Miss. 311, that a legal argument is deemed unnecessary by appellant's counsel.

Brief of B. F. Worsham and Thurmond & Harris:

First charge for appellee (see Record, page 9) we think is error. It is almost totally an abstract proposition, not applicable to the facts in this case. * * *

The third instruction we think most manifestly error, in this, it is clearly assumed as a fact fully proven or admitted. There is no proof tending to show that Ray blindly and inconsiderately believed; there is no proof to show that Ray rashly, wickedly, or wantonly trumped up the charge of larceny against Patrick out of weak and flimsy material, showing no probable cause, for the purpose of annoying him or frightening him, or for the purpose of extorting money from him. Here the court, in this instruction, not only says to the jury that "if they believe certain things to exist, never hinted at in the testimony, showing no probable cause, but for the purpose of frightening him, Patrick, etc., then there is a want of probable cause." Here the court clearly refers the matter of probable cause to the jury in effect, that if they so believe, that is, that Ray acted as stated, showing no want of probable cause, then there is a want of probable cause, and they will find for plaintiff. Here again malice, though the gist of this action, is wholly left out of the question, as far as this instruction is concerned.

But the fourth charge, * * *. Here again the question of probable cause is left to the jury, and if the jury believed that there was no probable or reasonable ground, but that Ray acted "rashly, wickedly," etc., then the court says "malice is conclusive and there is no probable cause." * * * This instruction leaves the jury no discretion, but malice does not necessarily establish a want of probable cause. See Cooley on Torts, 1845.

The sixth charge again leaves the question of want of probable cause to the jury, but states another hypothetical case, and tells them if they believe the hypothesis, "malice *is* inferred (note this time conclusive) and there is a want of probable cause," and again we insist that it must be left to the jury whether malice is conclusive or inferred from a given state of facts. See Cooley on Torts,

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184; Whitfield *v.* Westbrook, 40 Miss. 318, opinion of court, and then Greenleaf.

The seventh charge is objectionable, leaving the question of whether there was any ground known to Ray to the jury. * * * "It is error to refer the question of probable cause to the jury under any state of case, without delivering to them the principle by which they must be governed in determining the question." Whitfield *v.* Westbrook, 40 Miss., opinion of court, p. 317.

The eighth charge given for Patrick is contradictory. It, like others already noticed, leaves the question of probable cause to the jury. * * *

Brief of Falkner & Frederick:

It is the exclusive province of the jury to determine all questions where there is conflict in the evidence, and in this case the court will find from an examination of the record that the facts, fully established by the proof offered by the appellee on the trial in the court below, and not denied by the appellant, fully justified the verdict of the jury, and in all applications to displace verdicts regularly rendered the applicant must make it manifest to the court that injustice has been done. A full and complete defense must be set up so as to convince the court that upon another trial a different result would be reached. Huber *v.* Lane, 45 Miss. 608.

It is well settled by this court in the case cited below, that notwithstanding the misdirection of the court in giving an instruction, if the verdict be right, and a correct result be obtained, a new trial would be superfluous. Lushter & Tubby *v.* Barr, 45 Miss. 189; Wilson *v.* Korcheim, 46 Miss. 346; N. O. R. *v.* Burke, 53 Miss. 201.

In the case of N. O. R. *v.* Field, 46 Miss. 573, this court says the verdict of the jury will not be disturbed if it can be supported by any fair view of the testimony which may be taken, and have a right to take, although a particular instruction was refused, if, looking to all of the instructions given, the jury was furnished with full and sufficient guides as to the law to enable them to apply it to the facts of the case.

The affidavits and warrant charging the appellee with the crime of grand larceny, the return of the officer, and bond by appellee to answer the charge, and the judgment of acquittal by a court of competent jurisdiction, was the proof offered by the appellee, and

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when the fact of acquittal was fully established, as was certainly true in this case, then there was *prima facie* a want of probable cause, and alone authorized a verdict for the plaintiff. 40 Miss. 317; 2 Greenleaf on Evidence, 455; 1 Hilliard, 420, 421.

This action may be maintained, although the warrant for the party's arrest does not describe the offense with which he is charged, and the affidavit misdescribes it. 1 Hilliard on Law of Torts (3d ed.), 427; Swing *v.* Sanford, 19 Ala. 605; Kline *v.* Shules, 8 Ind. 484.

Was there known to and influencing the appellant at the time he instituted the prosecution such a state of facts as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably, and without prejudice, upon the facts within his knowledge, to believe or entertain an honest and strong suspicion of appellee's guilt? Unless this was true there was want of probable cause for the prosecution of Patrick, from which the jury may infer malice and will uphold a verdict for the plaintiff below. I Hilliard on Torts (3d ed.), 430, § 18. And the state of facts showing reasonable or probable cause must have existed at and before the institution of the prosecution and must have influenced the mind of the jury at the time of the act in question. 1 Hilliard, 429, § 17.

The charge No. 6, given at the instance of the plaintiff, is criticised by counsel because the jury are told that from the want of probable cause malice *is* inferred, instead of *may be* inferred. In the case of Whitfield *v.* Westbrook, 40 Miss. 311, the court held the question of probable cause in an action for a malicious prosecution is a mixed proposition of law and fact, and the want of probable cause is a *circumstance* from which a jury *may infer* malice.

The fifth charge given for the defendant gives in full all of the testimony of the defendant, and charges the jury hypothetically that if they believe such to be the facts of the case they should find for the appellant. The belief, however confident and strong, that a party has probable cause for prosecuting another, if induced by the prosecutor's own error, mistake, or negligence, and without any occasion of suspicion given by the party prosecuted, wil not amount to probable cause. 40 Miss. 311; 1 Hilliard on Torts, 432.

* * *

The record shows that Ray knew of Patrick's claim to wild hogs,

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that it was a *bona fide* claim upon the range, and gave him at least the *prima facie* right to hunt and kill wild and unmarked hogs running at large on the range, and it is, therefore, sufficient evidence of want of probable cause, and Ray is responsible. Weaver *v.* Townsend, 14 Wend. 192; 1 Hilliard on Torts, 433, note A. Again, the mere belief on the part of Ray that the facts within his knowledge would constitute the crime of grand larceny, when it did not, will not furnish probable cause, and, if maliciously done, constituted no defense in this section. 1 Hilliard, 432, § 18. * * *

We find upon inspection of the assignment of errors that the first and second are substantially the same. As to the affidavit, bond, and transcript of the justice of the peace, to which exceptions were taken, we have fully discussed their admissibility, and now refer the court to our brief.

As to the objection made by appellant to charges one, three, four, six, and eight, given for appellee, we think we clearly show by the authorities cited that they fairly presented the law of the case to the jury, and looking to all the charges given, both for appellant and appellee, we think the learned judge rightly refused to grant appellee a new trial.

The fourth ground assigned for error is that the court below refused charges asked by appellant. The appellant made no objection in his motion for a new trial, hence it is a rule of this court that it will not hear objections not made in the court below. Temple *v.* Hammock, 52 Miss. 360; Smith *v.* Sparkman, 55 Miss. 653.

OPINION.—CAMPBELL, J.:

The rules of law applicable to this case are clearly announced in the following cases: Greenwade *v.* Mills, 31 Miss. 464; Whitfield *v.* Westbrook, 40 Miss. 311; Insurance Co. *v.* Williams, 60 Miss. 916.

Tried by them, it was error to give the first, fifth, and eighth instructions for the plaintiff below, and the third, sixth, seventh, and ninth instructions for him are justly subject to criticism as calculated to mislead the jury.

A new trial should be had, and it is ordered.

Reversed and remanded.

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S. A. JOHNSON (a Lunatic), by Guardian, etc., *v.* W. B. HELM.

Ejectment.

In an action of ejectment, the plaintiff must show his title good as against the whole world to entitle him to recover.[1]

Ejectment by William B. Helm for possession of undivided half interest in lands occupied by Lewis H. Smith. By agreement W. T. Johnson, guardian of S. A. Johnson, an adjudged lunatic, and Smith's landlord, was admitted as codefendant, and defended the suit.

Jury was waived and the issue tried before the court. Judgment was for plaintiff, whereupon defendant appealed to the Supreme Court.

The opinion sufficiently states the case.

APPEALED from Circuit Court, LeFlore County, C. H. CAMPBELL, Judge.

Reversed and remanded, February 8, 1886.

Attorneys for appellant, Hooker & Wilson.

Attorneys for appellee, T. H. Somerville and J. E. Gwin.

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The plaintiff must recover on the strength of his own legal title. Winn *v.* Cole, 1 Walk. 119.

And this is so, though the defendant show no title. Hence he cannot recover premises not embraced in his deed as against a defendant showing no title, though he prove that it was the intention of the owner to convey it in the deed. McRaven *v.* McGuire, 9 S. & M. 34.

He must show his title good against the world unless the defendant be estopped to deny it. Doe *v.* Pritchard, 11 S. & M. 327; Wolf *v.* Dowell, 13 S. & M. 103; Cunningham *v.* Dean, 33 Miss. 46.

But though he can recover only on the strength of his title, yet he will not fail merely because his evidence fails to make out his title, if the defendant's evidence with the plaintiff's shows he has a good title, for the court and jury are to decide as to title upon all the evidence before them. Wightman *v.* Reynolds, 2 Cush. 675.

The rule which requires the plaintiff to show a good title as against all the world does not apply so as to require him to show title in the person from whom both parties claim title. Doe *v.* Pritchard, 11 S. & M. 327; Wolf *v.* Dowell, 13 S. & M. 103.

Possession of land for ten years gives the possessor and those claiming under him a sufficient title to justify a recovery in ejectment against a mere intruder who has no title. Anderson et al. *v.* Moore, 84 Miss. 400.

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Brief of Hooker & Wilson:

* * * * * * * * * *

The evidence shows that Stephen Johnson received the title to this land from two sources, the title to one-half from Mc. G. Wilburn, and the other half from Alexander Ferguson, receiver. * * *

These were the two separate and distinct sources of title in Stephen Johnson, one which he regarded as good and valuable, and the other of much less value. * * *

It is evident from the deeds that the grantor conveyed the title he received from Ferguson to his sons and warranted that title, and that he conveyed by quitclaim to appellee his doubtful Wilburn title. This is apparent from the face of the deeds without reference to the other testimony, but it is manifested more clearly when examined with the aid of the testimony.

Outlaw claimed to be the owner of only one-half of the land, Wilburn's interest, by virtue of his purchase under execution sale, and never claimed any other. Stephen Johnson claimed to be the owner of this same half, as well as the half he had purchased from Ferguson. * * *

The testimony shows that this was but a part of a large tract of land owned by Johnson and Outlaw. Can a joint owner take a particular part of an entire tract and sell by metes and bounds to a stranger? Unquestionably each party has a right to a partition of the land and one cannot forestall the other by conveying to a third party. It is easy to suppose that a bill for partition in kind was filed and a decree entered, and that this part of the land fell to the lot of Outlaw. Could this right be defeated by the previous sale to third party? An analogous case is found in Miller *v.* Richardson, 48 Miss. 328–335.

Where a mortgage was given by one of several joint owners over a particular part of the joint estate, the principle there discussed and the authorities cited that the deed if at all operative was only an estoppel.

But Johnson's possession was notice of his title. * * *

In 1878, S. A. Johnson leased the lands to Smith. He collected the rent and was sued by Outlaw for his portion of it. The testimony of Smith shows that S. A. Johnson was in possession of it, that he was his (S. A. Johnson's) tenant, that he paid him the rent for his half of the land. Mitchell, another tenant of part of the lands, testified to the same effect, in substance. * * *

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This is attempted to be overcome by proof that S. A. Johnson was the agent of his father in looking after his lands in LeFlore county. Granted that he was such agent, there is no evidence that Helm knew of such agency, or even if he did know of such agency, it does not affect his rights in this case. Being the agent of his father to look after his interest in land does not prevent him being the owner of land. It is not pretended that he misled Helm as to his ownership of a half interest, but simply promised Helm to assist him in the collection of the rent on the half interest he, Helm, had purchased from his father, the Wilburn half interest, and he did try to assist him in the collection but Outlaw collected it.

His sales and leases of the land, his occupation by his tenants, Smith and Mitchell, was sufficient notice of his deed. Taylor *v.* Mosley, 57 Miss. 547, and cases cited. * * *

S. A. Johnson, the appellant herein, and whom appellee seeks to estop by an alleged conversation with him in 1881 in reference to the collection of rents, is deprived of capacity to testify. His lips were as completely sealed as a witness as if he were dead. * * *

We do not think that the conversation between Helm and S. A. Johnson as to the collection of the rents was such as to preclude the defendant from asserting his title to the lands. * * *

In reference to the fourth and sixth assignments of error. The first mentioned is to the form of the judgment. We think the assignment of error is certainly well taken. S. A. Johnson, the lunatic, was the defendant through his guardian. It was not claimed that W. T. Johnson ever had or claimed any interest in the land. Yet the judgment rendered is against him both for the possession of the lands, and for the amount found to be due by the court for the use and occupation of said land. Under the judgment, the execution can only go against him, W. T. Johnson.

The sixth assignment of error brings into review the action of the lower court in refusing to grant a new trial for newly-discovered evidence. The evidence was certainly most material, and was unknown to appellant at the time of trial. By it the defendant would have shown Helm's knowledge of the condition of the title, and that the conveyance from Johnson to Helm was this disputed title between Outlaw and him, Johnson. * * *

Brief of T. H. Somerville:

The theory of appellant's counsel that the undivided half

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interest in the quarter sections which was sold under execution in favor of Outlaw, administrator, against Mc. G. Wilburn, was the identical undivided half interest which Stephen Johnson purchased from Mc. G. Wilburn in 1860, and sold to appellee, W. B. Helm, in 1881, is utterly inconsistent with the record. * * *

As to Johnson's possession at the time of appellee's purchase from his father. Ordinarily possession imparts notice of title, but the court will have in mind that S. A. Johnson was not only the son of appellee's grantor, but the agent of his father in the management of these lands. And furthermore that he agreed to act as W. B. Helm's agent. At most it can only be assumed that he was the owner of, and in possession of, an undivided half interest. He recognized the title of Helm after having made an agreement to act as his agent, which was a part of the inducement to the purchase. Under these circumstances no notice can be imputed to Helm by the alleged possession of S. A. Johnson. He held possession, if at all, by tenant Smith, and after agreeing to collect the rents for Helm, he is estopped from claiming that his possession is adverse to Helm.

* * * * * * * * * * * *

The third point is: "That open, notorious, adverse possession of the premises for more than ten years gives appellant a superior title."

We do not controvert this proposition of law, but such has not been the character of appellant's possession.

The most that can be contended for appellant here is that he and appellee were tenants in common, though he was a silent and secret tenant so far as Col. Helm's knowledge went. There was privity between them. Johnson assumed to act as the agent for appellee and never until the institution of this suit disclaimed the trust. Tyler on Ejectment and Adverse Possession, 876 *et seq.*

* * *

The appellee sued L. H. Smith. D. A. Outlaw took no notice of the suit, but appellant entered and was admitted to defend as the landlord of Smith. He did not with his plea give notice that he only defended as a tenant in common, or that he only claimed an undivided half interest as provided in § 2506, Revised Code 1880. On the contrary, appellant traversed plaintiff's declaration "that he demanded of L. H. Smith the possession of the equal undivided half interest in the tract." L. H. Smith was in possession of the

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entire premises. The action was against Smith and Johnson jointly after the latter was admitted to defend as landlord, and plaintiff's recovery must stand against Smith and Johnson, no matter what the source of plaintiff's title and notwithstanding the fact that S. A. Johnson or D. A. Outlaw may be entitled to show the ownership as tenant in common with plaintiff. He, defendant Johnson, was called upon not to show his title, but to controvert the title of Helm to an undivided half interest. * * *

The fourth assignment of error is not supported by the record. The judgment, we submit, was not rendered against W. T. Johnson for possession and rents. W. T. Johnson, guardian of S. A. Johnson, was on his own motion admitted to defend as landlord. The judgment is styled "W. B. Helm *v.* Lewis H. Smith," and after reciting the admission of W. T. Johnson, guardian, to defend as landlord, the record is that plaintiff do have and recover of the *defendants* the possession of the land, * * * and that he have and recover of the defendant W. T. Johnson, guardian of S. A. Johnson, the rents, etc. * * *

We submit, in conclusion, upon the premises:

1. That appellee's title is superior to that of appellant.

2. That if the respective deeds to these parties are to be regarded as conveying the same interest, or attempting such conveyance, then appellee is a *bona fide* purchaser for value and without notice of the unrecorded *deed of gift* from appellant's father.

3. That if appellee has shown title to an undivided one-half interest his judgment must stand.

Brief of J. E. Gwin:

* * * * * * * * * * * *

It is contended that Helm had notice, or by inquiry could have had notice, of S. A. Johnson's title, by reason of his possession. This rule extends this far and no farther. That when a party is in possession of land it is the duty of any one dealing with the land, to inquire by what right he holds the land, and it is presumed that such inquiry would lead to a development of the claim under which he holds, but when the inquiry is actually made and the possessor fails to disclose his title, the rule is reversed, and the person so remaining silent, or speaking, speaks in such a manner as to deceive the other, is forever estopped from setting up his title, to the injury of the other party. * * *

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Brief in reply of Hooker & Wilson.

In reply to the suggestion raised in brief of counsel for appellant, that the judgment must stand because the general issue was pleaded, and not a denial of possession as provided by section 2486, Code 1880, and that plaintiff was entitled to a judgment for a half interest against the tenant Smith, we state:

The declaration was filed claiming generally an undivided half interest. Appellant was in possession of an undivided half interest. He could not deny his possession for he was in possession of an undivided half interest in the premises in question. If he had done so, under section 2488, the plaintiff would have been entitled to judgment. And the result is, if appellant's theory is sustained, that by filing his plea denying possession, etc., plaintiff would be entitled to judgment for the land claimed in the declaration, but if he did file a plea of not guilty, then plaintiff on the facts in the case would be entitled to judgment because *such a plea was not filed.* Certainly "a most lame and impotent conclusion."

The plea is determined by the declaration, and the defendant Johnson could not be expected to deny his possession and let judgment go for plaintiff. If the declaration had been for all the lands, then the proper plea for Johnson would have been not guilty as to half and denial of possession as to the other half.

The statute more particularly refers to the defendant denying possession of parcels of a tract sued for than to aliquot parts thereof. But however that may be, it is impossible to conceive of any other plea that the defendant could have filed than not guilty. Under plaintiff's theory Helm did not claim as the cotenant of appellant Johnson, not in common with him but in opposition to him, and it was not incumbent on defendant to file any other plea than the one he filed.

The judgment is that plaintiff do have and recover of "defendants the undivided half interest of * * * which Stephen Johnson purchased from Mc. G. Wilburn" and that he recover of *defendant W. T. Johnson,* guardian of S. A. Johnson * * * the sum of $564.72. It is a judgment against Smith and Johnson for the land and against W. T. Johnson for the rents of the land.

If the judgment is good against Smith, and ought to stand, it certainly ought not to stand under the evidence against S. A. Johnson and W. T. Johnson, and we fail to see anything in the con-

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dition of the pleading that makes it imperative that the judgment should stand through contrary to the evidence.

CAMPBELL, J., delivered the opinion of the court:

In February, 1873, Stephen Johnson conveyed an undivided half interest in the lands sued for to his sons, H. E. and S. A. Johnson. This conveyance vested in the grantees a half interest in the land, if the grantor had such interest, no matter whence obtained. It was operative on any half interest he had, whether derived from Wilburn or another.

There was no particularization in this conveyance of a half interest with respect to the source of its derivation, and it did not leave in the grantor a particular half interest distinguishable by its source.

The conveyance to Helm was of the particular half interest which the grantor had obtained from Wilburn, and vested in him by force of its terms that interest, if it was not affected by the former conveyance of a half interest in February, 1873.

If Stephen Johnson had the entire interest, the former conveyance left a half interest in him, and it passed to Helm by the conveyance to him, notwithstanding the particular designation of the source of title descriptive of the interest conveyed.

Stephen Johnson, in 1859, got a deed to a half interest in this land from one Ferguson, and in 1860 a deed conveying a half interest in it from Wilburn. (The paper in the record which is spoken of by counsel as the deed from Wilburn to Stephen Johnson has not the name of Johnson in it, but is to *Stephen,* and, for all the record shows, may have been to some other Stephen but this may be a clerical omission.) Whether these conveyances relate to the same or different half interests is not shown, but it does not appear that Johnson claimed to be owner of the entire interest in the land, and the evidence is suggestive that the two sources of title embraced the halves which made the whole interest.

Johnson, claiming to be owner, had possession of some part of the land, and in 1871 leased some of it to one Mitchell, who occupied for five years, and afterward leased it from S. A. Johnson and Outlaw. The deed from Stephen Johnson to S. A. Johnson and H. E. Johnson was not recorded until after the conveyance to Helm, but it is indisputable that the land was at the time Helm bought occupied by a tenant of S. A. Johnson and Outlaw. It

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is true that S. A. Johnson was spoken to by Helm, and agreed to collect rent for Helm, on the Wilburn half interest, and tried and failed because of the refusal of the tenant to pay, and reported this to Helm, but in this, there is nothing inconsistent with ownership by S. A. Johnson of a half interest in the land different from the Wilburn half interest, and nothing to preclude him from claiming such interest, and collecting rent for it. If he had an undivided half interest in the land different from that conveyed to Helm, his recognition of Helm's claim and undertaking to represent him in collecting rent on Helm's interest did not prejudice his rights. It is apparent that Stephen Johnson claimed to have owned the entire interest.

He conveyed an undivided half generally to his two sons in 1873, and a particular half interest to Helm in 1881. S. A. Johnson was agent of his father, and knew that he claimed to have owned the entire interest in the land. He knew, of course, that his father had conveyed an undivided half interest to himself and brother, and that he was in possession of this half interest by the tenant Smith and in the receipt of rent for his half interest.

There was another half interest in dispute between Stephen Johnson and Outlaw, both of whom claimed an undivided half interest under Wilburn, while Johnson claimed to have derived another half interest from another source.

Interpreting the acts of S. A. Johnson by the light of these facts, it is manifest that his agreement with Helm to collect rent for the Wilburn half interest conveyed to him had reference to these conditions, and was nothing more than the assumption of an agency for Helm as to the particular interest specified, and when the tenant refused to pay rent to him for Helm, and he reported the matter to Helm, the relation between him and Helm ended.

There was nothing in this to estop S. A. Johnson to claim his own half interest which his father had conveyed in 1873, if that was a different half interest from that conveyed to Helm, and, as stated before, the evidence is strongly suggestive that the two half interests in the land had been acquired from different sources by Stephen Johnson, who conveyed one, generally, to his two sons, and the other by particular designation to Helm. S. A. Johnson did nothing to deceive or mislead Helm. He was under no obligation to disclose to Helm his title to an undivided half interest generally in the land. He had, as he assumed and as is supposed,

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a perfect title to a half interest in the land, and had possession of it by his tenant. He made no claim to the particular half interest conveyed to Helm. That was quite distinct from what had been conveyed to him. He and Helm had claims to different interests. He was in the enjoyment of his interest and was willing to act as agent for Helm to collect rent accruing on his interest, and he made an effort to do this, and failed, and reported his failure to Helm. That terminated the relation between them. Helm instituted this action against Smith, the tenant. S. A. Johnson applied to be admitted to defend as landlord, and entered the plea of not guilty. This put Helm to the proof of his right to the possession of the undivided half interest sued for. In order to recover it was necessary for him to show a title good against the world, or that the defendant was estopped to question his title, which as between them must be taken to be good. There was no deraignment of title such as to entitle Helm to recover on the strength of his own title, and there is no estoppel shown against S. A. Johnson.

The parties do not claim the same interest and, therefore, cannot be said to claim title from a common source.

They claim distinct titles, and although from the same person, he is not the common source of title in the sense which gives rise to the well-known rule on that subject.

There is nothing shown to preclude Johnson from standing on the defensive and compelling Helm to show his right to the undivided half interest he claimed.

It seems to be true that prior to the suit there was no antagonism between Helm and Johnson as to the Wilburn half interest, and if Johnson desired to defend only as to his own half interest, he should have proceeded under section 2506 of the Code, and thereby the proper issue would have been presented between them, and upon the presentation made by the record Johnson would have succeeded in the case. But Johnson chose to defend as to the whole and although the reason for this course is not apparent to us, we think he had the right to defend as he did and put in issue Helm's claim and it was not maintained.

The judgment should have been for the defendant below.

Reversed and remanded, February 8, 1886.

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BERKSON BROS. et al. v. MAX KAHN.

Attachment — Trial of Plea in Abatement — Erroneous Instructions.

On the trial of a plea in abatement in an attachment suit, where the evidence shows that defendant's wife was placed in possession of part of the attached personal property under a parol sale by the husband, it is error for the court to instruct the jury for the defendant that the sale to his wife was not fraudulent if the debt was a *bona fide* debt and the sale in good faith without adding that a parol sale to his wife was void as to creditors, when the attachment is by a creditor of the defendant.[1]

Appellee, Max Kahn, was engaged in merchandising and running a livery stable in Gloster, Miss. He owed debts to dif-

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Transfers of Property — Suits Pending.

A transfer of property from a husband to his wife, otherwise valid under Code 1892, § 2294, regulating the subject is not rendered invalid by the fact that suits were threatened or pending against the husband at the time it was made. Donoghue et al. *v.* Shull, 85 Miss. 404.

Although a transfer of property from a husband to his wife was made with intent to defraud existing creditors of the husband, it is valid as to the subsequent creditors, under Code 1892, § 4228, so providing, unless made to defraud them, and hence it is valid as to a creditor who had knowledge of the transfer, consented thereto, and treated the wife as the real owner of the property so transferred before the husband contracted the debt due to him. Donoghue et al. *v.* Shull, 85 Miss. 404.

A conveyance executed for value and in good faith by a husband to his wife cannot be avoided by a creditor of the husband whose debt was unsecured at the time under Code 1906, § 2294, providing that a conveyance between husband and wife shall not be valid as against a third person unless it be filed for record, where it was filed for record before the creditor obtained lien. Green et al. *v.* Weems et ux., 85 Miss. 566.

Fraudulent Conveyances — Husband and Wife — Suit against Vendor — Notice to Vendee.

The fact that a husband has been sued by another creditor at the time he conveyed property to his wife, in satisfaction of a debt due her, is not alone sufficient to charge her with notice of his intent to defraud other creditors in so doing. Graham *v.* Morgan, 83 Miss. 601.

Same — Intent to Prefer Wife.

A conveyance from a husband to his wife, in satisfaction of pre-existing valid indebtedness, is not fraudulent as to his creditors where the value of the property conveyed does not exceed the amount of the debt, although the husband designed to prefer his wife. Graham *v.* Morgan, 83 Miss. 601.

Does not apply to leases of land between husband and wife; applies only to transfers of property. One who takes a trust deed from the husband on

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ferent parties and on January 10, 1885, he sold his stock of goods and merchandise to his uncle, Lewis Kahn, and his livery stable to his wife Chodena Kahn, by writings duly signed and delivered and which were recorded. The recited considerations were debts due the grantees by Max Kahn.

On January 13, 1885, appellants sued out a writ of attachment against Max which was levied upon the property in Mrs. Kahn's possession. Max Kahn filed a plea in abatement and on the trial of that plea he testified that some of the property attached was not included in either of the bills of sale, but that that was an oversight, as the property had really been sold to Mrs. Kahn in payment of a debt he owed her and that he delivered the property

crops grown on land leased by him has actual notice that the wife has subleased a part of the land, though by parol, the trust deed will not affect the wife's crop grown on the subleased land. Underwood *v.* Ainsworth, 72 Miss. 328.

Parol evidence is incompetent to show either the transfer or notice to third parties. Montgomery *v.* Scott, 61 Miss. 409.

A conveyance by a husband to his wife on consideration held to be partly real and partly fictitious, is valid as to the true amount due, but void as to the excess. Thompson *v.* Heath, 55 Miss. 656.

A previous voluntary promise by the husband to give his wife at some time a sum of money is not such a valuable consideration as to support a deed.

This applies to creditors regardless of when their rights accrued. Gregory *v.* Dodds, 60 Miss. 549.

Rule does not apply to property situated outside of State. Davis *v.* Williams, 73 Miss. 708. See also Walker *v.* Marseilles, 70 Miss. 283.

A conveyance of property from the wife to the husband which is not filed for record is invalid as against a third person. Watkins *v.* Duval, 69 Miss. 364.

An unacknowledged deed from husband to wife is not valid against an attaching creditor, although the creditor had seen the deed on record before attaching. Snider *v.* Woodenware Co., 74 Miss. 353.

Transactions prior to adoption of Code are not affected. Walker *v.* Marseilles, 70 Miss. 283.

Transfer of husband's cotton crop not produced by the wife to the wife, not in accordance with the Code 1880, § 1178, is void, and purchaser from her acquired no title. Black *v.* Robinson, 62 Miss. 68.

Where a husband and son made a deed to the wife and mother, who filed deed on November 20th, and the husband and son made an assignment on November 21st, held, that failure of wife to have deed recorded is not sufficient to vitiate the conveyance in the absence of any evidence connecting her with a fraudulent scheme. Klein *v.* Richardson, 64 Miss. 41.

See also §§ 2294 and 4228 of Code of 1906.

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to her before it was attached and that she was in possession of it at that time.

The sixth and seventh instructions referred to in the opinion of the court are as follows:

"6. The court instructs the jury that a debtor has the right to pay any creditor in full whether he is able to pay all his creditors or not, and may prefer one or more creditors if he desires. And if the jury believe from the evidence that Max Kahn disposed of his property at a fair price in the payment of actual debts owed by him he had the right to do that and an attachment cannot be sustained against him for that reason or upon that ground.

"7. The court instructs the jury that the act of Max Kahn in paying the debts of Lewis Kahn and his wife, Chodena Kahn, were not fraudulent if the debts were *bona fide* and the sale was in good faith, even if the jury believe he could not pay all his creditors."

From verdict and judgment for defendant dismissing the attachment and awarding damages to defendant plaintiff appeals.

FROM the Circuit Court of the Second District, Amite county.

Reversed and remanded, May 25, 1885.

Attorney for appellant, D. C. Bramlett.

Attorneys for appellee, Neilson & Stockdale.

Brief of D. C. Bramlett:

First the instructions Nos. 5 to 10, asked by appellants, plaintiffs in the court below, should have been given by the court. The evidence in the case about which there is no dispute shows that appellee was engaged in merchandizing and conducting a livery business in the town of Gloster, and, being indebted, applied to his commission merchants to advance him the ensuing year, but failing in this, conveys land and stock of goods, etc., to his uncle, and mules and horses to his wife, in settlement of real or pretended debts due them. The sales are kept secret from his brother merchants in Gloster, and to all outward appearances the mercantile business is carried on in the same way and manner after the execution of the deeds as before; the defendant's sign remains, advertising him to the world as the owner after the sale, and he is found

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in the store as before sale, selling goods as usual, and no notice given to any one save the grantees of the change of ownership. And I would first call the attention of the court to instruction 10, ask by appellants and refused by the court below. I insist that under section 1300, Code of 1880, the facts adduced here entitled the appellants to this instruction. This section, by the Code of 1880, is made a part of the law in relation to the prevention of frauds, and is elaborately construed by this court in Jumbel *v.* Koon, 59 Miss. 264. In the case cited, on p. 267, this court says:

"The object of the statute (section 1300) was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it, evidenced by his dealings with it; and it conclusively fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted, or who," etc. * * *

Now, we find the defendant making a deed of his stock of goods to his uncle, and yet holding himself out to the world by his sign as the owner, and this the section referred to stamps as a fraudulent intent to dispose of his property as to his creditors, and justifies an attachment. I hold that under the section referred to, to complete a sale of a stock of goods, etc., and render it valid, as against creditors, the sign of the seller, where one is exhibited, must be taken down or changed. This, I insist, is as essential as a delivery, or that the contract of sale be in writing.

If, however, I should be mistaken in this view, instruction No. 5 (pp. 27 and 28) is clearly right, for it only charged that the fact of the sign remaining after sale was a circumstance to be considered by the jury, with all the other testimony in the case.

Second. The instructions, six, seven, and eight, asked by plaintiffs and refused by the court, should have been given. Let us analyze and consider instruction No. 7, though the other two are upon the same line. This instruction simply propounds the law that the sale here, to be valid as against creditors of the seller, must be accompanied by a real, actual, and open change of possession, such as would be publicly known as far as the circumstances would admit of, and if the jury believed from the evidence that after the sale defendant remained in possession of the property sold substantially as he was before the sale, then the jury should find that the attachment was rightfully sued out. In other words,

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that it was a fraud as to creditors. Under the testimony in this case, if the jury found the facts to exist as required by this instruction and Nos. 6 and 8, and it was for them to determine this question, appellants were entitled to a verdict in the court below, and a new trial should be awarded.

Third. The second error assigned complains of the court below in granting instructions one to eight for defendant. Instruction No. 1, for appellees (p. 33, Rec.), required appellants, in order to sustain their attachment, to prove to the satisfaction of the jury that the acts of appellee were done in fraud of his creditors. This instruction places the standard of proof higher than law demands in controversies depending upon the character of evidence as adduced in this case. The law is that the jury, in a civil case, are to decide facts upon the weight or preponderance of the evidence, even though the proof does not show such facts to their satisfaction. See Stratton v. C. C. H. Ry. Co., 95 Ill. 32.

This instruction was calculated to mislead the jury, and should not have been given. See P. L. Ins. Co. v. Dill, 91 Ill. 174.

Instruction No. 2 should have been qualified to accord with the testimony in the case, and is clearly misleading in the form given.

Instruction No. 4 for defendant (p. 34) should have been modified so as to show what was necessary to constitute a valid sale as against creditors. From this instruction a jury might properly infer that the execution of a deed or bill of sale was all that was necessary, although the seller retained possession and enjoyed the benefit and profits of the property.

Instruction No. 5 (same page) is not applicable to the evidence, for there is no testimony showing or tending to show that Lewis Kahn ever did anything with the stores and goods, and what the instruction means I am unable to divine.

Instruction No. 6, while good law, should not have been given, for it was only calculated to mislead the jury. Appellants were not trying to sustain their attachment because appellees had settled with, or paid, one or more creditors by a sale of property, but because he had fraudulently disposed of his property, or attempted to do so. The purchasers might acquire a good title, and yet the seller might render his property liable to attachment.

Instruction No. 7 assumes the fact that appellee was indebted to his uncle, Lewis Kahn, and his wife, Chodena Kahn, and that he made sales of property to them in satisfaction of such debt

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was a question for the jury to determine. In addition to this the instruction was calculated to mislead the jury.

Upon the third and last error assigned I have nothing to say, in addition to the above, except that we are clearly entitled to a new trial, and this we ask of this honorable court.

Brief of Neilson & Stockdale:

Instruction No. 5 was properly refused. Max Kahn had sold out and delivered possession of said store to Lewis, and Max had no control over it, and the sheriff testifies that Lewis nor any one could not have removed it, and Max had no interest in or power over it. Max ought not, surely, be attached for what Lewis did or did not do after he had sold out to Lewis, and had no further control over the store. And, further, the instruction was bad because it asks the court to instruct that if Max remained in the store, it is a matter to consider, etc. This is too broad; he might have remained there to work or do nothing, and not subject himself to attachment, unless he was disposing of his property.

The instructions given for plaintiff had fully presented the law of plaintiff's case to the jury, and there was no error in refusing the others, Nos. 5, 6, 7, and 8, as the only effect they could possibly have would be to confuse and mislead the jury and could throw no additional light on the issue. The ninth and tenth instructions are identical, and announce that the mere fact of the old "sign" remaining over the "storehouse," as a matter of law is conclusive of fraud, and alone justifies the attachment. These were properly refused. Appellant cites section 1300 of Code of 1880, and Gumble *v.* Koon, 59 Miss. 264, to support his views. We submit that neither the section nor the decision have any application whatever to the case at bar. The statute applies to a "person transacting business as a trader or otherwise agent, etc., and fails to disclose the name of his principal," or "who shall transact business in his own name." It is not pretended that Max Kahn, after Saturday evening, was transacting business in this store in any way. Nor does the decision apply; in that case, Buffington was buying cotton, transacting business in his own name, and cotton acquired by him in this business was subjected to a judgment against him, and the court held that the sign was conclusive evidence of ownership. There was a trial of the right of property, and the secret claim of Gumble was the fraud on cred-

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itors. Here is an attachment issue. Max Kahn is charged with defrauding his creditors, and the court is asked to charge as "conclusive" evidence of fraud on the part of Max Kahn an act which, if this decision applies, would keep his property within reach of his creditors and subject to his debt, and so with the five instructions. It was not even a circumstance to be considered as tending to show fraud in Max Kahn; in this issue, its tendency was the opposite.

There was no error, we submit, in the instructions given for defendant, when considered with those given for plaintiff. The conclusion reached is correct, and should be affirmed.

OPINION.—COOPER, C. J.:

It is an undisputed fact that a large portion of the attached property was not validly transferred either to Lewis Kahn or to Chodena Kahn, the wife of the defendant, although she had been placed in the possession thereof by her husband under a parol sale, which was void as to his creditors. It is unnecessary to decide whether placing the wife in possession under this invalid transfer was *per se* such a fraud upon the creditors as justified suing out the attachment; it was, at least, such patent evidence of a fraudulent intent that the sixth and seventh instructions for the defendant should not have been given without an explanation added thereto that a parol sale was not a valid sale as to creditors.

Judgment reversed.

CORA M. HAYS *v.* F. C. MERCER.

Lien — Maturity of Payments on.

It is error to embrace in a decree on a suit to enforce a purchase-money lien, the amount of any payment not then matured.[1]

On January 27, 1880, F. C. Mercer entered into an agreement to sell to Cora M. Lockhart through her husband, J. T. Lock-

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Where there are several notes secured by a vendor's lien, and all are due, the money arising from foreclosure should be applied ratably to the several notes, and this although there has been a judgment at law upon one of them. Wooten *v.* Buchanan, 49 Miss. 386; Kausler *v.* Ford, 47 Miss. 289; Aaron *v.* Warren, 62 Miss. 370.

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hart, a tract of land for $400, and Mercer executed and delivered a deed to the land to J. T. Lockhart, made out to Cora M. Lockhart, which was filed in the office of the chancery clerk of Holmes county. Six days thereafter, J. T. Lockhart died, and shortly thereafter Mercer filed this suit in the Chancery Court of said county, alleging that though the deed recited a cash consideration of $400 for the purchase of the land, there was nothing in fact paid on same, but that the amount was to be settled in one, two, three, and four years in payments of $100 each, the first of which was to be paid by Mercer boarding for one year with the Lockharts, and that Lockhart was to secure and deliver to Mercer notes evidencing the payments, but on account of his death, was not done. The evidence shows that no payment was made on the land, and the chancellor decreed the allegations of the bill sustained, and appointed a commissioner to ascertain the amount due. The report of the commissioner showed the whole amount of the purchase price due, with interest thereon, though one of the payments had not matured.

From which decree defendant appeals.

APPEALED from Chancery Court, Holmes county, R. W. WILLIAMSON, Chancellor.

Reversed and remanded, November 3, 1884.

Attorneys for appellant, Gwin & Noel.

Attorneys for appellee, Hooker & Wilson.

Brief of Gwin & Noel:

* * * We shall examine the case under the three following queries:

First. Do the pleadings set forth any such case as entitles appellee to the relief prayed?

The holder of notes maturing at different times may enforce his lien to satisfy one or more of the past due notes without waiting until all have matured. Furr *v.* Morgan, 55 Miss. 389.

When some of the notes are not due when the bill is filed, complainant should ask that those falling due before final decree shall be included in it; otherwise it is error to include them in the decree. Williams *v.* Cresswell, 51 Miss. 818.

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Second. Does the testimony establish any liability against appellee as against the land?

Third. Does the testimony tend to establish any such case as entitled appellee to the relief asked?

As the bill nowhere alleges that the "promise or agreement upon which this action is brought" or some memorandum or note thereof is in writing signed by the party to be charged therewith, "who in this action is appellant or by some person by her lawfully authorized;" and as such a writing to be used would have to be set forth in, and made an exhibit to the bill; and as this action is founded on a "contract for the sale of lands," and was "not to be performed within one year from the making thereof," it is prefectly obvious that appellee has made out no such case as entitled him to the relief prayed for and given.

This statute (that of frauds) contains no exceptions in regard to such contracts, and this court has repeatedly decided that it is not for us to create exceptions where none exists. 45 Miss. 386.

As it is a cash deed, appellant's acceptance of the land under it would of itself impose no obligation of indebtedness. Neither would her possession of it so operate, had she taken possession, as was decided in the case cited. There is, however, no allegation or proof that appellant has either taken possession or proposes to do so. The case stands upon the bare issue of an allegation, and its denial of nonpayment of the deed's consideration.

Had appellant made a parol agreement upon the faith of which a deed to her had been executed, and had then declined either to perform such an agreement or to reduce it to writing, then an action for specific performance or to rescind the trade and cancel the deed might lie; but certainly not an action to enforce a verbal agreement of the nature of the one on which this suit is founded. Appellee, notwithstanding his assumed ignorance and neglect of ordinary business methods, knew this, and in attempting an explanation of his statement that under the original agreement the purchase money was to be paid by Mr. Lockhart, deposed that "the notes were to be signed by Mrs. Lockhart to make the title complete in her."

We will now take up our second query. It the evidence sufficient to establish the liability sought to be imposed on appellee?

The deed plainly and unequivocally acknowledges the receipt of its consideration, $400. While such a recital is not conclusive, it is *prima facie* evidence, and as this court has declared, "It is

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important evidence in the nature of contemporary admissions by the vendor and vendee." The deed's recital of cash payment is sustained by all the uncontroverted circumstances of the case, and appellee's testimony of nonpayment is in conflict with other proof in every point except such as where no possible proof could be had from any one but him and the dead, Mr. Lockhart.

J. A. Cason wrote the deed as a cash deed, believing the trade to be a cash consideration. As Cason who was a lawyer was called upon to draw the deed, he would have been called upon to write the notes had any been contemplated.

Appellee knew it was a cash deed, and that Mr. Lockhart had requested it to be so written. Mr. Cason deposed that Mr. Lockhart had so directed him. As alleged in the bill, the deed was executed and filed for record October 26, 1880. The date of its acknowledgment as well as Mercer's deposition prove that the twenty-sixth and not the twenty-seventh of October is the true date. It was nine days after, on November fourth, that Mr. Lockhart was shot, and died the third day afterward. Appellee had been a surveyor for forty years, and had frequently drawn deeds, and was well versed in the laws on this subject; according to his own statement he did not speak to appellant on this subject for about a year or more after Mr. Lockhart's death, not until the last of 1881 or first of 1882. It is indeed incredible that appellee with his legal experience in conveyancing should have executed and delivered a deed acknowledging payment of the consideration, if the consideration had not been paid, and have taken no writing had there been any deferred payments; and it is still more incredible that he should have allowed to pass without attempting to obtain such writing, or offering any explanation of his omission, not only the nine days before Mr. Lockhart was shot, but the three days during which he was wounded and before his death; and then, for the first time, approached Lockhart's widow as to this matter a year or more after his death. At the time the trade was made, and when Mr. Lockhart was shot, appellee was a resident of the same town though not with him when he died.

Against his deed and in conflict with the undisputed facts appellee brings his unsupported testimony. * * *

Brief of Hooker & Wilson:

A bill filed by appellee alleging sale of certain land to appellant and nonpayment of the purchase money. Purchase of the land by the appellants admitted, and the only defense is *payment*.

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To dispose of the point raised in appellee's brief for the *first* time that no recovery can be had on account of the Statute of Frauds, it is sufficient to say that in her answer she neither denies the trade, nor pleads the Statute of Frauds, and hence cannot avail herself of the statute, even if it applied to the case at bar. Brown, Statute Frauds, § 508; 58 Miss. 842. * * *

The question for the court to pass upon in this case is a question of fact and the test to be applied is, was the decree of the chancellor manifestly wrong? The appellee was entitled to his decree without any testimony on his part. The attention of the court is especially called to the allegations of the pleadings. The bill charges that the appellee sold the land in controversy to the appellant for the sum of $400, to be paid annually from the date of said deed. Defendant in her answer does not deny these allegations of the bill, does not deny that the land was sold to her for $400, payable as alleged. These are admitted and established facts. Code 1880, § 1892. These facts with the pleadings conclusively establish the sale of the land to her for $400 on a *credit.* She does answer the bill however, and the only defense pretended to be set up is the affirmative one of payment. The *onus* is upon *her* to establish the payment. The burden of proof is shifted to her shoulders.

How does she meet it? By whom and how does she prove she paid the money? She does not claim that she paid it, and she says positively that she does not know how, when, or where it was paid, nor in fact that it was ever paid for. Neither James Hays or Cason knows of any payment being made. The single and sole circumstance that the deed acknowledges the receipt of the purchase money is the only evidence tending to show payment for the land. But even the deed fails as a circumstance for the reason that the *pleadings admit that the sale was not for cash but on time.* Appellant certainly fails to prove the payment as she has alleged in her answer.

So we say that under the recognized rules of pleading and evidence, the appellee was entitled to his decree without his testimony to sustain his bill. * * *

PER CURIAM:

The appellee was entitled to a decree, but not to that rendered, for according to his bill, the last installment of the purchase money was not due when the decree was made. It was, therefore,

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premature to embrace that in the decree which should have been for what was then due.

We reverse the decree, and will enter here such decree as the court below should have given, or remand the cause if desired by complainant so that he may get a decree for the last installment now due.

JUDGE COOPER takes no part in this case.

K. E. WALKER *v.* R. M. PIGOTT et al.

Deeds — What Constitutes Delivery.

Where there is no delivery of an instrument purporting to be a deed, it is fatally defective as such, and ineffectual for any lawful purpose.[1]

A bill was filed in the Chancery Court of Lauderdale county, in January, 1886, by appellants, seeking to enjoin proceedings in an action of ejectment filed by appellees to recover possession of cer-

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The delivery to the husband of a joint deed in the name of himself and wife, to a justice of the peace, with instructions to get the signature and take the acknowledgment of the wife is not a sufficient delivery as to the husband, if the wife refuse to execute the deed. Johnson *v.* Brooks, 31 Miss. 17.

When the right attempted to be conveyed is joint, and the deed purported to be made by the several joint owners, proof of execution by one alone will not authorize its admission in evidence to establish a right to the property. Shirley *v.* Fearne, 33 Miss. 653.

The most essential and efficacious act in making a deed is the delivery, for that shows it to be the grantor's deed. Armstrong *v.* Stovall, 4 Cush. 275; Bledsoe *v.* Little, 4 How. 13.

Actual delivery to grantee in person is not necessary. Wall *v.* Wall, 30 Miss. 91; Kane *v.* Mackin, 9 S. & M. 387.

But a deed is not valid until delivered to and accepted by grantee or some one for him. McGehee *v.* White, 31 Miss. 41; Bullitt, Miller & Co. *v.* Taylor, 34 Miss. 708.

An instrument, though executed and acknowledged and in form a deed, is inoperative as such, if retained by the grantor who manifests the intention that it shall not take immediate effect as a deed. Davis *v.* Williams, 57 Miss. 843.

Where such instrument is placed by the signer with other papers in a box and deposited in a bank, with a written statement enclosed that it is to be handed to the grantee, no time for such delivery being fixed, this mani-

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tain lands devised to them in 1859. The facts set forth are that James M. Pigott and wife purchased a large stock of goods in December, 1858, amounting to some $2,500, and that shortly thereafter, in consideration of one Brandon assuming to pay said amount of purchase for them (James M. Pigott and wife), that they conveyed the lands in controversy by deed to Brandon, who went into possession of same. This deed was not delivered to the said Brandon by Pigott and wife. Several months after the execution of this deed James M. Pigott died, and some time thereafter the deed was found amongst the papers of deceased, and was delivered by the administrator to the said Brandon. This deed was signed by James M. Pigott and Catherine R. Pigott. The acknowledgment of both signers was taken before the said *James M. Pigott, Justice of the Peace.* Appellant purchased the land from the Commercial Bank of Meridian, after it had passed through several hands theretofore. Appellees were the sole and only heirs of James M. Pigott, and after reaching their majority filed their ejectment suit, and were enjoined from proceeding with same by appellants.

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fests an intention to fix a future period for the title to vest, and that the instrument was not to take effect as a deed from its date; and if the maker dies without making delivery and leaving his purpose unexecuted, the instrument will be inoperative as a deed for want of delivery. Davis *v.* Williams, 57 Miss. 843.

An instrument signed and acknowledged as a deed and intrusted to an agent for safe-keeping with directions not to deliver it unless the grantor should die, before returning from a certain journey, is inoperative, though delivered after the death of the grantor while on such journey, in pursuance of his intention to vest title to the property in the grantee in the event of his death. Under these facts there is no present delivery, absolute or conditional. Weisinger *v.* Cook, 67 Miss. 511, 7 So. 495.

Without delivery a deed is not effectual, but acceptance may be implied from circumstances. Harkreader *v.* Clayton, 56 Miss. 383.

Manual delivery to and possession of a deed by the grantee is not sufficient. There must be an acceptance and assent that it shall be operative. Kearney *v.* Jeffries, 48 Miss. 343.

Delivery is a question of intention, and while it may be effected without the maker's parting with the paper, his retention of it is always a circumstance strongly evidential of a want of delivery. Hall *v.* Barnett, 71 Miss. 37, 14 So. 732.

A mother, before her death, executed a deed conveying her residence to a daughter who lived with her, and placed it in her wardrobe. The daughter knew nothing about it until the mother, when leaving to visit another a few months after, told her where the deed was, and that she had given

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From a decree dissolving the injunction and dismissing the bill complainant appeals.

APPEALED from Chancery Court, Lauderdale county, S. EVANS, Chancellor.

Affirmed, April 19, 1886.

Attorneys for appellant, Woods, McIntosh & Williams.

Attorneys for appellee, Dial & Witherspoon.

Brief of Woods, McIntosh & Williams:

As we understand the case, there are two questions raised by the record, either of which decided for appellant must result in a reversal of the ruling of the court below on the motion to dissolve the injunction:

1. Was there such a constructive delivery of the deed from Pigott and wife to Brandon and wife as to convey the title from Pigott to Brandon. In other words, will equity regard what was done as a delivery of the deed?

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the property to her. *Held*, sufficient to sustain a finding that the deed had been delivered. Young *v.* Elgin, 27 So. 595.

A husband and wife signed and acknowledged a trust deed in favor of infants; the trustee, who was himself one of the grantees in certain contingencies, having already signed it as trustee "in token of his acceptance of the trust." It was deposited, enclosed in an envelope, by the husband in a merchant's safe, with an indorsement on the envelope, made by the merchant at his request, that it was to be delivered to no one, under any circumstances, except to himself or the trustee. Some time after, he deposited it with another merchant with a like indorsement in the handwriting of the latter on envelope enclosing it, that it was not to be delivered to any one, under any circumstances, except to himself and a nephew of the trustee. But both depositories declared that it was not to be delivered to any one except the husband until after his death. For about fifteen years, and till after his death, the deed remained deposited with the understanding on the part of both depositories that he could get it at any time, and on the part of one of them that it was subect to his control, and it was never recorded. There was nothing to show delivery by the wife, and the evidence tends to show that she thought she had made a will. While it was so deposited the grantors executed conveyances of property included in the deed, utterly inconsistent with its delivery. If the wife had died intestate before the husband, he would have inherited all her part of the lands conveyed by the deed.

Held, that there was no valid delivery of the deed. Hall *v.* Waddell, 27 So. 936; 78 Miss. 16.

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2. Is an undelivered deed, under the facts of this case, a sufficient memorandum to avoid the Statute of Frauds, etc.?

The argument of the first question will necessitate a *close* scrutiny of the facts bearing upon this point, under the light of the authorities of our own and other courts. We deem it immaterial whether Brandon paid Pigott in money or relieved him of an indebtedness to the Keetons. One would be as valuable a consideration for a deed as the other, and the courts could not quibble on such a matter as this. Was it the *intent* of the grantor that the deed should be delivered? If so a court of equity will regard it as having been delivered. * * *

We deem it unnecessary to cite any authorities upon the point that if Pigott intended to deliver the deed to Brandon that a court of equity would treat the deed as having been delivered. This point is well settled by the authorities, as may be seen in the following: Martindale's Law of Conveyancing, § 2059, and authorities; Nichols *v.* County of Davidson, 3 Tenn. Ch. 547; Farrar *v.* Bridges, 5 Humph. (Tenn.) 412; 2 Strobh. Eq. (S. C.) 270; 1 Iredell Eq. (N. C.) 475; 1 Johns. Ch. 255; 5 Cal. 315; Vol. XX, Cent. Law Jour. 47, article from Thomas W. Pierce, where a great many authoriteis are collected and commented upon.

On the second point, if an imperfectly executed, undelivered deed is intended to be delivered by the grantor, while it may not convey the legal title, it would be a good contract for the sale of the land and take the case out of the Statute of Frauds. 58 Miss. 486, and authorities above cited.

It would in this case, as in the case of a perfect deed, be dependent entirely upon the *intention* of the grantor to deliver the same. * * *

Brief of Dial & Witherspoon:

* * * We submit that the law applicable to the above state of facts is not an open question in this State. The fact that the paper was not delivered is alone enough to make it void as a memorandum. An undelivered deed is not a sufficient memorandum to satisfy the statute. Johnson et ux. *v.* Brook, 31 Miss. 17; Jelks et al. *v.* Barrett, 52 Miss. 314.

The case at bar is a stronger one than the Johnson case. In that case the deed was acknowledged by Johnson himself, while in this it was acknowledged by neither of the grantors. In that the deed was delivered to the magistrate and thus passed out of

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the possession of the grantor that wrote it, while in this the deed did not get out of the possession of either grantor. In that, one of the grantors did all in his power to have the deed delivered and fully intended that it should be, while in this it is evident, as we have shown, that neither of these grantors intended that this deed should be delivered. In that, Brook was ready and willing to pay the price agreed upon and instituted the very suit itself for the purpose of forcing Johnson and wife to take the money and convey the title, while in this, Brandon never paid or offered to pay a cent of the money.

But there are several expressions in the opinion of the court in the Johnson case which seemed to serve as crumbs of comfort to opposing counsel in the court below. The court say: "We have been able to find no case in which a writing signed by party and kept in his possession without delivery to the other party has been held to be a compliance with the statute." In that case and in this the deed was signed by the grantor. In that it was "kept in his possession" till the institution of a suit against him when it seems to have made its appearance in court, while in this it was "kept in his possession" until his death, which is as long as any man can have a deed "kept in his possession." In that case the possession of the deed was "without delivery of the deed to the other party," but with a delivery of the deed to the justice, while in ours the deed was retained "without delivery" to any one. According to the position of counsel if in the Johnson case the justice of the peace instead of returning the deed to Johnson had delivered it to Brook, that would have made it a good contract. The court further says in that case: "It would appear strange if such a paper could have that effect when it is entirely within the power of the party to destroy it and prevent its being used as evidence."

OPINION.—PER CURIAM:

The instrument purporting to be a deed from Piggott and wife to Brandon was not delivered, and for this reason, it is fatally defective as a deed, and is ineffectual for any lawful purpose. Davis et al. *v.* Williams, 57 Miss. 843; Johnson *v.* Brook, 31 Miss. 17.

The conclusion renders it unnecessary to consider other points argued by counsel.

The decree is *affirmed.*

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E. HEYMAN *v.* FRANK DILLARD.

Agency — Evidence.

Declarations of an agent made after consummation of a sale cannot be admitted to prove agency.[1]

Same — Instructions.

Instructions by the court to the jury that testimony as to declarations made by one outside the scope of his authority, acting in the light of an agent, was incompetent to establish the fact of agency, and this will cure any injury that might have resulted from the improper admission of such evidence.

Appellee purchased of Julius Marx, a mule warranted to be sound in every particular, in default of which the mule could be returned and money refunded. A suit was instituted in the justice court for the recovery of the purchase price, $105, and judgment obtained for said amount against Julius Marx and E. Heyman, principal, and on appeal to the Circuit Court the following facts were brought out:

Appellee desiring to purchase a mule applied to E. Heyman & Co., who offered to sell to appellee a mule for $125. Later he applied to Julius Marx and a trade was consummated. The evidence for plaintiff showed that Marx sold the mule for E. Heyman, the proceeds except $5 having been paid to said Heyman, and that it was the same mule offered by Heyman to appellee. This latter statement was contradicted by evidence for appellant.

For the defendant the court gave the following instructions: "That it is the duty of a person dealing with an agent to ascertain the extent of an agent's authority, and where there is no general agency and no question as to the act of the agent being within his apparent powers, but outside of his private instructions,

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The fact of agency cannot be proved by the mere declaration of the agent. Railroad Co. *v.* Cocke, 64 Miss. 713, 2 So. 495.

And this, although the declarations were made at the time of the act. Kinnare *v.* Gregory, 55 Miss. 612.

It is elementary law that agency cannot be proven by the acts or the declarations of the alleged agent. Therrell *v.* Ellis, 83 Miss. 494, 35 So. 826; Newman *v.* Taylor, 69 Miss. 670, 13 So. 831; Gilchrist *v.* Pearson, 70 Miss. 351, 12 So. 333.

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the party dealing with him deals at his own risk and he is presumed to know the extent and limit of the agent's authority and if this be exceeded the contract is void as to the principal, but is binding on the agent."

Upon the conflict of evidence offered, the jury found for the plaintiff, and from the judgment rendered, defendant appeals.

APPEALED from Circuit Court, Copiah county, T. J. WHARTON, Judge.

Affirmed, March 1, 1886.

Attorneys for appellant, Calhoon & Green.

Attorneys for appellee, Miller & Cohn.

Brief of Calhoon & Green:

We submit that this case should be reversed because the verdict is against the great preponderance of the testimony, in fact that it has no testimony which was properly admitted to sustain it.

Marx's declarations tending to show his agency were incompetent, having been made, if made at all, in the absence of Heyman. Besides the court will find by examining the evidence, particularly the testimony of Harper, White, Higdon, Marx, and Heyman, that the jury decided against right and reason, and must have gone off on the mere presentation of a farmer at war with an Israelite. We invite a careful examination of the statements of the witnesses and feel great confidence that the conclusion will be reached that this verdict was grossly unjust, not only on the ground intimated above, but for the further reason that the clear weight of evidence is to the effect that the mule had no real unsoundness but was the victim of transitory ailment. It seems to be a first rate mule now, and its present owner values it at $20 more than Heyman paid for him.

On well-settled principles, the court erred in admitting evidence of Marx's declarations as to the fact and scope of his agency made in the absence of Heyman. The objection was made and overruled in the presence and hearing of the jury, and it is not fair to claim now that the course of the court in granting an instruction on the general subject contrary to this ruling cured the evil. This court knows too much of juries to suppose that this could

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disinfect the average juror. The only way to neutralize the poison effectually was to withdraw the ruling and inform the panel that it must not consider the specific testimony. Mere generalizing in an instruction is not enough.

Brief of Miller & Cohn:

* * * Agency like any other matter may be proven by circumstances and while it may be that both Marx and Heyman denied the agency on the stand, the jury was not bound to believe them and had a right to do just as they did, find a verdict based upon the circumstances shown by all the testimony in the case as they believed them.

It was not error for the court to admit Marx's admissions, etc., because they were admissible to contradict him as a witness, and the court very properly instructed the jury that it is incompetent to prove the fact of agency, by evidence of the declarations of the supposed agent made to the witness not in the presence of the principal.

This instruction clearly cured any error if any was committed in admitting that testimony. And the jury with that instruction before them could not have based their verdict upon an improper use of the testimony referred to. The testimony should have and doubtless did have weight with the jury in the way of estimating the value of Marx's own testimony and could have had no other effect.

The fact that the mule remained in Heyman's possession up to and after the sale to Dillard and of his offering to trade him to Birdsong, and of the money going direct to him from the purchaser, and that he told Dillard that Marx was to have $5 for selling the mule, as well as many other circumstances, are sufficient to support the verdict as to the agency.

The unsoundness of the mule is abundantly established by the testimony of Dillard, Welch, Gus. Fletcher, J. H. Garth, and S. M. Fletcher, and that is all that was necessary to prove. The verdict should be sustained.

OPINION.— COOPER, C. J.:

The court erred in admitting in evidence the declarations made by Marx after the sale, that he had sold the mule as agent for the defendant, Heyman. The fact that he was such agent could not be proved by his own declaration thus made. 2 Greenleaf on Evidence, 63, note B.

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It would have been better if the court had excluded the testimony even after it had been admitted than to instruct the jury as it did do, that the fact of agency could not be proved by the declaration of the agent. But since this instruction was given, and in view of the fact that Marx himself was introduced as a witness and denied having made such statement, and that much testimony was introduced on both sides upon the question of his agency for Heyman, we think it manifest that no injury resulted to the appellant on the whole facts disclosed. The evidence, though not admitted for that purpose, would have been competent as going to the credibility of the witness Marx, and since the court told the jury that the evidence was incompetent to establish the fact of agency, we think that the judgment should be

Affirmed.

G. M. BANKSTON *v.* J. N. CATCHINGS, AGENT.

Appeal and Error — Objections in the Supreme Court.

Objections to the form of an affidavit and bond will not be heard for the first time in the Supreme Court.[1]

Judgment.

A judgment for the amount of an attachment suit is erroneous where it does not show the assessment of the value of the separate pieces of property levied on.[2]

On January 1, 1881, W. H. Catchings sold to Orange Catchings a farm, under a contract in which certain payments were to be

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Objections not raised in the court below will be reluctantly noticed here; and this rule was applied where an objection was made here to the certificate of a deed read in evidence without objection. Hundley *v.* Buckner, 6 S. & M. 70.

And so, where the objection of champerty was made here to a deed, the objection in the court below being that there was no proof of its execution. Sessions *v.* Reynolds, 7 S. & M. 130.

No question can be adjudicated here which was not the subject of decision in the court below. Byrd's case, 1 How. 163.

The rule applies to failure to object to the regularity of the change of venue. Prusell *v.* Knowles, 4 How. 90.

That an answer in chancery was not properly sworn to, nor filed in proper time. Yeiser *v.* Burke, 3 S. & M. 439.

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made on same yearly until the full amount was liquidated. The contract also provided that should the alienee fail to meet the payments as agreed, then he was to pay a stipulated sum as rental for the land each year, a lien upon the growing crop being expressly reserved therein. Orange Catchings executed to Matthews & Co., a deed of trust on his growing crop on said land for that year, to cover supplies furnished him by said Matthews & Co. W. H. Catchings, early in the fall of 1882, learning that said Orange Catchings was about to abandon the place and remove all the proceeds of his crop for that year, sued out an attachment for rent, $250, agreed on under the contract, on seven bales of cotton, 1,000 bushels of cotton seed, and forty bushels of corn. Appellant filed a claimant's issue and bond, as assignee of the deed of trust given by Orange Catchings. The form of the attachment and bond of W. H. Catchings was irregular, but objection was not made

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And that there was no proof that the defendant in ejectment was in possession. Dixon *v.* Porter, 1 Cush. 84.

Nor that a deed was not recorded in the proper county. McCraven *v.* McGuire, 1 Cush. 100.

Nor that a replication was not filed. Binns *v.* Stokes, 5 Cush. 239.

Nor that the jury had separated in a capital case. Dyson's Case, 4 Cush. 316.

The rule applies to points not raised in the pleadings in a chancery case. Ferguson *v.* Applewhite, 10 S. & M. 304.

Also to new causes of demurrer. Matthews *v.* Sontheimer, 39 Miss. 174; Prewitt *v.* Coopwood, 30 Miss. 369.

To the competency of witnesses. Ferguson *v.* Oliver, 8 S. & M. 332; Ned & Taylor's Case, 33 Miss. 364.

To decide new points is to assume original jurisdiction. Doe *v.* Natchez Insurance Co., 8 S. & M. 197; Commercial Bank of Manchester *v.* Martin, 9 S. & M. 613.

Objections to competency of evidence not raised in court below. Neely *v.* Planters' Bank, 4 S. & M. 113; Doe *v.* Ingersoll, 11 S. & M. 249; Coopwood *v.* Foster, 12 S. & M. 718; House *v.* Fultz, 13 S. & M. 39; Chew *v.* Read, 11 S. & M. 182; Alexander *v.* Eastman, 37 Miss. 554; Monk v. Horn, 38 Miss. 100.

This court will not entertain questions not raised below. Anderson *v.* Leland, 48 Miss. 253; Griswold *v.* Simmons, 50 Miss. 137.

To the absence of bill of particulars. Tierney *v.* Duffy, 59 Miss. 364.

To the competency of jurors. Rolls *v.* State, 52 Miss. 391.

To the competency of witnesses. McGehee *v.* Martin, 53 Miss. 519; Brown *v.* State, 57 Miss. 424; Richardson *v.* Foster, 73 Miss. 12, 18 So. 573.

To verdict. McNairy *v.* Gathings, 57 Miss. 215.

To commissioners' report. Ricks *v.* Hillard, 45 Miss. 359.

Objection that a bill for partition is in effect an action of ejectment,

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thereto in the court below. From a verdict sustaining the attachment and adjudging that "seven bales of cotton, 1,000 bushels of cotton seed and forty bushels of corn levied on, be returned, and when sold by the officer (or so much thereof as may be necessary), $250 due said Catchings be liquidated," the defendant appeals.

APPEALED from Circuit Court, Copiah county, T. J. WHARTON, Judge.

Reversed and remanded, March 2, 1885.

Attorney for appellant, L. B. Harris.

Attorney for appellee, R. N. Miller.

Brief of L. B. Harris:

The affidavit of the agent avers that the debt to become due is owing to him and does not aver that it is owing to his principal.

complainants having neither actual nor constructive possession of the land held adversely by defendant, cannot be made in this court for the first time. Black *v.* Washington, 65 Miss. 60, 3 So. 140.

A failure to object to a variance. Richardson *v.* Foster, 73 Miss. 12, 18 So. 573.

Objection to the admissibility of evidence not raised in trial court will not be considered on appeal. Pearson *v.* Kendrick, 75 Miss. 416, 23 So. 290.

An objection to the introduction of a verified account against intestate's estate cannot be raised for the first time on appeal. Cazeneuve *v.* Martinez, 28 So. 788.

Unless objection be made in the trial court to the proof of the contents of a writing by parol evidence, complaint thereof in the Supreme Court will be unavailing. Wagner *v.* Ellis, 85 Miss. 422, 37 So. 959.

The objection that an affidavit in replevin was not duly sworn to will not be considered when made for the first time in the Supreme Court. Matthews *v.* Cotton, 83 Miss. 472, 35 So. 937.

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A failure to comply with the statute vitiates the verdict. Young *v.* Pickens, 45 Miss. 553; Redon *v.* Alexander, 47 Miss. 254.

Where the attachment is levied on various articles, which are replevied, the value of each article separately should be assessed. Thomasson *v.* Wadlington, 53 Miss. 560; Atkinson *v.* Foxworth, 53 Miss. 733.

If the value of the property be not assessed it is error to render judgment for the whole of plaintiff's demand against the sureties. Phillips *v.* Harvey, 50 Miss. 489.

A writ of inquiry, being purely statutory, is allowed only where the issue on a plea in abatement to the attachment is found for defendant (Code 1880, § 2429); or where plaintiff voluntarily dismisses his attachment (Code 1880, § 2432); Betancourt *v.* Maduel, 69 Miss. 839, 11 So. 111.

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The bond is not the bond of the principal, but is the bond of the agent. By inspection of the bond it will be seen that it obliges the principal to do nothing. The appellant's claim presented the issue between him and the landlord, whether the goods were the property of the claimant or whether they were liable to the distress. Everman *v.* Robb, 52 Miss. 657.

The summary remedy for rent is likened unto a judgment and execution for the recovery of a moneyed demand. Towns *v.* Boarman, 23 Miss. 187.

Hence the requirements of the statute authorizing the writ of distraint must conform to it in every substantial particular. The use of the name of W. H. Catchings in the affidavit and the bond executed by the agent upon which the distress warrant issued is only descriptive of the character in which the agent sued and binds himself.

The bond is signed thus, "J. N. Catchings, agent of W. H. Catchings." An inspection of it will show that it obliges W. H. Catchings (landlord) to do nothing. It is not his bond, but the bond of his agent. Grubbs *v.* Wiley, 9 S. & M. 29; Wilks *v.* Back, 2 East, 142; Massey *v.* Scott, 7 Cush. (Mass.) 216; Wilburn *v.* Lamkin, 3 Blackf. 55; Martin *v.* Almond, 25 Mo. 313; Hunter *v.* Miller, 6 B. Mon. 612.

If the bond on its face purported to be the bond of the principal the signing as it appears would be sufficient,— hence the jury ought not to have found by their verdict that the distress was lawfully made.

Another view presented is, that the contract of purchase and rent between the landlord and tenant being in the alternative, that is, the tenant was at liberty to pay the installment of purchase money due January 1, 1883, or declining to do that, would pay the stipulated rent. The defendant undertakes to justify his right in having instituted the rent suit on the ground that the tenant stated in October, 1882, to the landlord and his agent, that he did not intend to pay either purchase money or rent. The tenant in his testimony denies this statement, but admits that he told the agent afterward that he would not pay rent, but that he expected Matthews & Brother to pay the installment of purchase money when due. Whilst it may be admitted that the verdict of the jury settled these facts against the tenant, the claimant contends that under the contract between the landlord and the tenant,

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no distress could be lawfully made except in default of paying the installments of the purchase, due on January 1, 1883.

A vendor ought not to be allowed this short method of abrogating the contract of purchase and converting it into the relation of landlord and tenant before the time arrives for such relation to arise, but if under the contract and the other facts of the case he is warranted in forcing that relation so as to enable him to institute proceedings, he should as landlord be held to pursue a remedy which whilst it would preserve his rights in having the property or its proceeds appropriated as intended by the parties, would at the same time protect the tenant in his rights more than the contract. We suggest that the landlord had such remedy provided by section 1854, Code 1880. A proceeding under this section would have preserved the rights of both parties until the time of payment promised by the contract came around, if the landlord was entitled to any remedy. The contract to pay rent shows that the payment was to be from the proceeds of the crop, which certainly implies that the tenant should exercise control over it so as to convert it into money.

The remedy adopted by the landlord was violent and destructive of every right which the tenant had under the contract.

Brief of R. N. Miller:

It is too late here to object to the form of the affidavit and bond for attachment for rent. They are both good anyway and in form as required by section 1304, Code of 1880. No objection was made to the affidavit or bond in the court below, or the bond could have been fixed. §§ 2305–2307.

Orange Catchings, the tenant, is the only person who could complain of the illegality of the distress. Appellant could make no such objections. The affidavit and bond are literally in the language of sections 347 and 349.

As to whether appellant was landlord, see Nobles *v.* McCarty, 61 Miss. 456.

The verdict was proper, and the judgment thereon under section 1314, Code of 1880.

It is not necessary for the jury to assess the value of the property because the judgment is bound to go for the whole debt, and for the residue after the property is sold if it should bring less than the debt for rent. Though in form an action of replevin,

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Statement of the Case.

yet this action is not for property but for rent due. Code 1880, § 1314.

A surrender of the property does not release Bankston, as it would in replevin, but he must pay the whole rent found due, regardless of the value of the property, hence there is no reason why the property should be valued by the jury.

OPINION.— ARNOLD, J.:

Responding to the errors assigned in this cause, we conclude, first, that as no objection was made to the affidavit and bond and warrant in the lower court, none can be made here; second, that the landlord was not required to pursue the remedy provided by section 1854 of the Code; and third, that it was error for the jury not to assess the separate value of the property levied on and replevied.

The judgment is reversed, the verdict is not disturbed, and the cause remanded in order that a writ of inquiry may be awarded to ascertain the separate value of the property.

March 9, 1885.

J. H. P. WESTBROOK *v.* BOARD OF SUPERVISORS OF DE SOTO COUNTY.

Board of Supervisors — Right to Sue — Rejection of Claim.

Before suit can be entered against the board of supervisors, on a claim against the county, a statement of account must be rendered to and rejected by the board; the rejection of a claim being a condition precedent to a right to sue.

One having a claim against a county may, under section 1384, Code of 1871, present it to the board of supervisors for allowance, and if it is rejected, he may bring suit against the county. He cannot sue unless the claim has been presented to and rejected by the board. Lawrence County *v.* Brookhaven, 51 Miss. 68.

One having a claim against a county has open to him two modes of prosecuting it: Under section 1383, Code of 1871, by presentment for allowance to the board of supervisors and appeal to the Circuit Court in case of refusal, or under section 1384, by suit against the board in any court of competent jurisdiction, after it has refused the claim. In either case the right of appeal to the Supreme Court exists. Taylor *v.* Marion County, 51 Miss. 731.

Section 1381, Code of 1871, requires the allowance of a claim by the board of supervisors to be entered on the minutes, but this is not true of the

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Statement of the Case.

This was a suit by Dr. J. H. P. Westbrook for salary as county health officer of De Soto county. He was appointed to this office by the Governor April 7, 1880, and served as such until his resignation on November 1, 1882. He presented his account for services rendered from July 1, 1880, to January 1, 1882, $270, which was allowed, and by the board of supervisors paid in accordance with a resolution passed by said board in July, 1880, which reads, "In this cause the board having read the law, the Acts of 1880, section 12, of the Health Law and duly considered the same. It is by the board ordered that Dr. J. H. P. Westbrook, chief health officer of De Soto county, be and he is hereby allowed a salary of $180 per year, or $15 per month for his services from first of July, 1880." In July, 1882, plaintiff presented another account for services from January 1, 1882, to July 1, 1882, for $90, which was also allowed and paid by the board of supervisors. At the July, 1882, term of the meeting of said board an order was made "that the salary of the chief health officer of this county be fixed at $1 per month," and later an order was entered "accounts

refusal to allow claims. Section 1384, requiring a claim to be presented to the board as a condition precedent to a suit thereon, is satisfied if the claim is presented and disallowed, whether any record thereof be made or not. In a suit plaintiff may show by parol the rejection of the claim. Brookhaven *v.* Lawrence County, 55 Miss. 187.

An ordinary action cannot be maintained against the county on a county warrant. The statute giving the right to sue a county does not embrace claims that have been allowed and for which warrants have been issued, these being already in the nature of judgments. It is only where a board of supervisors refuses to allow a claim that an action may be brought on it. Klein *v.* Warren County, 51 Miss. 878.

Code, § 292, declares that a person having a claim against a county should present the same to the board of supervisors, and if the board refuses to allow it, claimant may appeal from such judgment to the Circuit Court, or sue the county. Section 320 provides that all demands against a county shall be audited and allowed or rejected on due proof in term time. *Held*, that a representation of a claim against a county to the board of supervisors thereof was a condition precedent to a right to sue thereon. Marion County *v.* Woulard, 77 Miss. 343, 27 So. 619.

A claim against a county was formally presented by the claim attorney to its board of supervisors, and the facts supporting it were stated in his communication with particularity. *Held*, that it was a sufficient presentment thereof. Clay County *v.* Chickasaw County, 76 Miss. 418, 24 So. 975.

Not necessary to enter order of refusal on the minutes of the board. Clay County *v.* Chickasaw County, 76 Miss. 418, 24 So. 975.

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payable out of the county fund: Dr. J. H. P. Westbrook, chief health officer, from July 1, to October 31, 1882, $1 per month, $4." This warrant was tendered by the board to plaintiff and refused. Plaintiff then instituted suit for $100, balance due on salary from April 7, 1880, to October 31, 1882. At the trial before the circuit judge, judgment for plaintiff was rendered for $45.65. From which plaintiff appeals.

APPEALED from Circuit Court, De Soto county, A. T. ROANE, Judge.

Reversed and remanded, February 2, 1884.

Attorneys for appellant, White & Morgan.

Attorneys for appellee, Malone & Watson.

Brief of White & Morgan:

* * * Appellees insist that the case should have been dismissed by the court because it is not shown that the claim for the salary was presented to the board and by them refused to be allowed. This objection is made for the first time *here,* and would be too late even if the case came within the rule laid down in Lawrence County *v.* City of Brookhaven, 51 Miss. 68.

But it does not. The duty of presenting the claim is only imperative when the matter has not been considered by the board. Here the proof both of plaintiff and the members of the board shows that they had fully considered plaintiff's claim,— put it at $4 in full,— issued him a warrant for that amount which was tendered to him and refused by him.

A refusal to pay may be made in various ways, and when made gives the right to sue. It was unnecessary to go formally to demand what had already been refused.

Brief for appellee not found in record.

OPINION.— COOPER, C. J.:

It was not permissible for Westbrook to institute his suit against the county unless his claim had been presented to the board of supervisors for allowance and had been by it rejected. The rejection of the claim by the board is a condition precedent to a right to sue. Lawrence County *v.* Brookhaven, 51 Miss. 68; Brookhaven *v.* Lawrence County, 55 Miss. 187.

Judgment *reversed.*

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N. O. & N. E. R. Co. *v.* W. E. JONES.

Railroad — Liability for Killing Stock — Peremptory Instruction.

In a suit against a Railroad Company for killing a horse if the testimony does not show that the horse was struck and injured by some locomotive or train of the defendant, nor that it had been in a position in which it could have been struck, a peremptory instruction should be given for the defendant.

Suit by W. E. Jones against the New Orleans & Northeastern Railroad Co. to recover damages for killing a horse. From a verdict and judgment for plaintiff defendant appeals. Reversed.

On the trial plaintiff testified that he found his horse on his back in a ditch, dead, one morning, about one hundred and twenty-five yards from the railroad; that he tracked him back to a sawdust pile which was about thirty yards from the railroad track which was the nearest point to the railroad, where he found tracks; that the horse had his hind leg broken; that it had rained a little the night before and he examined the railroad track and right of way, but could not see any signs where a horse or animal of any kind had been on it the night before. John Bertrand testified for plaintiff that he saw the horse, and it was about one hundred and twenty yards from the railroad, and he tracked him back toward the railroad to the sawdust pile about thirty yards from the railroad track; that he examined the railroad track carefully and could see no

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The burden of proof in such cases is on the plaintiff to show negligence. Miss. Cent. R. Co. *v.* Miller, 40 Miss. 45; N. O., J. & G. N. R. Co. *v.* Enochs, 42 Miss. 603; Memphis & C. R. Co. *v.* Blakeney, 43 Miss. 218; Raiford *v.* Miss. Cent. R. Co., 43 Miss. 233; Memphis & Charleston R. Co. *v.* Orr, 43 Miss. 279.

In the absence of eye-witnesses, marks of an animal on the track and the position of its remains may make satisfactory proof that it was killed by the running of the train, which, under the statute, is *prima facie* evidence of negligence on the part of the company. Railroad Co. *v.* Packwood, 59 Miss. 280.

Section 1059, Code of 1880, and section 1808, Code of 1892, making proof of injury inflicted by the running of locomotives or cars *prima facie* evidence of negligence on the part of the company, do not help the case if the plaintiff's own evidence shows that the defendant was not guilty of negligence. Mobile R. Co. *v.* Holt, 62 Miss. 170.

Section 1059, Code of 1880, has no application to a case where a horse, being off the track, left a safe path through fright and falls or jumps into

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sign of any horse or cow on the track the night before, and there had been a light rain the night before; that he could not say that the horse was killed by defendant's locomotive or train.

When plaintiff rested defendant asked the court to instruct the jury to find for defendant; this instruction was refused.

Defendant's motion for a new trial was overruled and it appealed.

Appealed from Circuit Court, Perry county, S. H. Terral, Judge.

Reversed and remanded, May 24, 1886.

Attorneys for appellant, Fewell, Watkins & Brahan.

Attorney for appellee, R. Seal.

Brief of Fewell, Watkins & Brahan.

* * * It was simply impossible for the horse ever to have been struck by an engine and knocked across the dirt road. As shown by some of the witnesses, it would have broken every bone in the body of the horse and killed him on the spot. Plaintiff's witnesses say that they cannot testify that defendant's engine ever struck the horse. The only reasonable theory is that the damage was done when the horse leaped over the logs and over the stumps as described. Surely a Railroad Company cannot be held for such acci-

a ditch. The injury is not inflicted by the running of the cars. Lowe *v.* A. & V. R. Co., 81 Miss. 9, 32 So. 907.

A peremptory instruction is proper only where all the facts in evidence taken as true, with every just inference from them, fail to maintain the issue. Whitney *v.* Cook, 53 Miss. 551; Railroad Co. *v.* Boehms, 70 Miss. 11, 12 So. 23.

And if there is any conflict in the evidence, the view which is most favorable to the party against whom the instruction is asked must be taken as true. Carson *v.* Leathers, 57 Miss. 650.

Where there is a material conflict in the evidence, a peremptory instruction should not be given. Richardson *v.* Tolliver, 71 Miss. 966, 16 So. 213; Thrasher *v.* Gillespie, 52 Miss. 840; Cantrell *v.* Railroad Co., 69 Miss. 435, 10 So. 580; Timberlake *v.* Compress Co., 72 Miss. 323; 16 So. 530.

Peremptory instruction to find a certain way is improper unless the court, on the evidence, would set aside a contrary verdict. Bernheim *v.* Dibrell, 66 Miss. 199, 5 So. 693; Holmes *v.* Simon, 71 Miss. 246, 15 So. 70; Railroad Co. *v.* Doyle, 60 Miss. 977.

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dents as this. Strange as it may seem, the juries of the country would so hold them if they could.

1. Under the evidence in this case, we think the court erred in giving plaintiff any instructions. We regret that the clerk was unable after the trial to find the instructions, but assume it as a settled proposition of law that no court is authorized to instruct a jury for plaintiff or defendant upon any legal proposition when by the evidence the party has totally failed to show his right to legal redress. Such is surely the case in this suit. What portion of the evidence proves or tends to prove plaintiff's case?

2. Under the evidence in this case, we contend that the court should have given a peremptory instruction to find for the defendant. Take plaintiff's testimony. He says he tracked the horse from the sawdust pile over a sharp stump to where he found him; saw hair and blood on the stump. Examined the dump and track of railroad and saw no signs of where any animal had been on it. He draws a diagram. The wound was as large as a thumb. What part of the pilot, we would ask, could have struck this horse's leg as high up as this wound, and no where else? The very diagram offered by plaintiff is most conclusive against him in his case. It is simply impossible to have struck the horse at this place and do the damage done, hence the court ought to have given the peremptory instruction. In an action against a Railroad Company, alleging the negligent killing or injuring of stock, before a presumption of negligence on the part of the company could arise, proof that the company or its agents caused the injury must be clear and unmistakable. Such is not the case in this suit, and such not being the case, the court ought to have given defendant's peremptory instruction. This is a much stronger case than the case of the Kentucky Central R. Co. *v.* Talbot, 78 Ky. Rep. 621. In that case, the court said the evidence conduced to show that the bull was killed by one of the train of cars operated by the railroad company, but in this case there is no evidence to show or tending to show that plaintiff's horse was struck at all by defendant's cars. And proof of the killing must be satisfactory before any presumption of negligence can be indulged.

3. The court should have set aside the verdict in this case and granted a new trial. There is no sort of proof even tending to prove the injury to have been done by the cars of the Railroad Company. Unless the killing is proven by clear and satisfactory

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proof, negligence cannot be presumed. In this case, there is no such proof. See Brown *v.* Congress, etc., R. Co., 8 Am. & Eng. R. Cas. 383.

Where there is no evidence of negligence and no evidence from which negligence could be presumed, then the case should not even go to the jury. Philadelphia R. Co. *v.* Schertle, 12 Am. & Eng. R. Cas. 158.

We submit that the court below ought to have set aside the verdict of the jury and granted defendant a new trial.

Brief of R. Seal:

The only question before the court is, did appellant's employees kill the horse of Dr. Jones, etc. All the facts and circumstances of the killing of the horse were submitted to a jury; being judges of the weight of the evidence before them, they reached the conclusion, from all the facts before them, that the horse was killed by the agents and employees of appellant.

This settled the liability of the damages upon appellant. No question is raised as to the value of the animal killed.

We contend that the verdict was fully sustained by the evidence and the Circuit Court ruled right in refusing to grant a new trial. On this point we refer to the case of the New Orleans, Mobile & Texas R. *v.* Toulme, 59 Miss. 284, and believe the decision of the court below will be affirmed.

Opinion.— Per Curiam.

The verdict was manifestly wrong. The testimony does not show that the horse was struck and injured by any locomotive or train of appellant, or that he was, or had been, in a position in which he could have been so struck or injured. Shortly after the horse was injured, examination was made, under favorable conditions, to ascertain if there were any tracks of the horse on or about the railroad bed, or signs of his having been struck or thrown from the railroad track, and the witnesses all concur in the statement that no such tracks or signs could be found.

If, as some of the witnesses testified, there were signs of the horse having been on the sawdust pile thirty or thirty-five feet from the track, this alone did not warrant the verdict.

The judgment is reversed, and a new trial awarded.

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GILBERT SMITH et ux. *v.* E. L. HARRIS.

Supreme Court Practice — Presumption of Correctness of Decree of the Lower Court.

A decree of the lower court will not be reversed in the Supreme Court unless the record affirmatively shows that injustice has been done, the presumption being that the court had sufficient reason for its action.[1]

Same — Filing Answer Out of Time.

An answer to a bill in chancery filed out of time should be stricken from the file on motion, but, on proper showing, leave to refile should be granted by the court upon reasonable terms.[2]

Appellee, E. L. Harris, filed the bill in this case against appellants in the Chancery Court of Tunica county, on February 21, 1886; summons was issued for the defendant March 31, 1886, returnable to rules on the first Monday in April, 1886, and duly served on defendants. Defendants did not answer the bill until the 19th day of May, 1886. The bill was filed to foreclose a mortgage given by defendants to complainant. The answer set up that the mortgage debt had been paid in full. No *pro confesso* decree had been taken when the answer was filed and no motion

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1. The action of the court below is presumed correct, unless error is made manifest by the record. Byrd's Case, 1 How. 162.

2. This rule is of universal application with reference to courts of general jurisdiction, and recognized in every other court; there can be no reversal unless the record show error affirmatively. Grant *v.* Planters' Bank, 4 How. 326; Harris *v.* Newland, 5 How. 654; Briggs *v.* Clark, 7 How. 457; Abbott *v.* Hackman, 2 S. & M. 510; Ross *v.* Mims, 7 S. & M. 121; Green *v.* Creighton, 7 S. & M. 197; Long *v.* Shackleford, 3 Cush. 559; Stedman *v.* Holman, 33 Miss. 550; Pass *v.* McRea, 36 Miss. 143; Gale *v.* Lancaster, 44 Miss. 413.

3. The same rule applies to Probate Courts. Smith *v.* Berry, 1 S. & M. 321; Effinger *v.* Richards, 35 Miss. 540; Wells *v.* Smith, 44 Miss. 296; Scott *v.* Porter, 44 Miss. 265.

4. Although this court might have found differently, it will not reverse a decree on controverted facts, where it appears that the court may have fairly reached the conclusion it did. Davis *v.* Richardson, 44 Miss 499.

5. Such a decree is analogous to a verdict, and will not be disturbed, unless shown to be opposed to the preponderance of the testimony. Apple *v.* Ganong, 47 Miss. 189.

6. The presumption in favor of a decree includes conclusions both of law and fact. It will not be disturbed unless shown to be clearly wrong, being

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had been made for a *pro confesso* decree. At the next regular term of the Chancery Court in October, 1886, complainant made a motion to strike the answer from the files on the ground that it was not filed within the time allowed by law. The court overruled the motion, but ordered that the answer should stand filed as of the first Monday of May, 1886, that being the time the answer should have been filed under the law. On October 8th, less than five months after the time the answer was in fact filed, the cause was set down for hearing by complainants, and a decree was rendered directing the mortgage to be foreclosed for the payment of the mortgage debt. From that decree defendants appealed, assigning as error the action of the court in ordering the answer to stand filed as of the first Monday in May, and the refusal of the court to dismiss the bill at the hearing.

APPEALED from Chancery Court, Tunica county, J. G. HALL, Chancellor.

Affirmed, May 3, 1886.

Attorney for appellant, Calvin Perkins.

Attorneys for appellee, St. John Waddell and L. Brame.

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analogous in this respect to the verdict of a jury. Partee *v.* Bedford, 51 Miss. 84.

7. In a case depending upon facts, where the evidence is conflicting and the mind cannot repose with confidence upon a conclusion in favor of either party, this court will not disturb a decree. Wilson *v.* Beauchamp, 50 Miss. 24; Valentine *v.* McGrath, 52 Miss. 112; Randall *v.* Yates, 48 Miss. 685; Harrington *v.* Allen, 48 Miss. 492.

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1. A demurrer was disallowed, and a reasonable time given to the defendant to answer; no answer was filed for ten months and then complainant proposed to take a *pro confesso*, and the defendant asked leave to file his answer: *Held*, that the court before admitting the answer to be filed should demand the most conclusive showing of the causes for the delay, accompanied by a meritorious answer. The answer must accompany the application in such a case. Pattison *v.* Josselyn, 43 Miss. 373.

2. When the defendant has not filed his answer in time, and asks for additional time in which to file it the court in granting leave may impose as a condition that the answer when filed shall be considered as filed of the term at which the leave was granted so as to enable the complainant to set the cause for hearing after the expiration of five months from the date of the order, without being compelled to admit that the answer is true. Reynolds *v.* Nelson, 41 Miss. 83.

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Brief of Calvin Perkins:

The question is, when may an answer, without permission of court, be filed? We reply, under section 1889 of the Code, at any time before a *pro confesso* has been taken. That section requires a defendant who has been cited to a rule day, to answer on or before the next succeeding rule day. "And if the defendant shall fail to answer at the time required, as aforesaid, the complainant's bill may then, or at any time afterward, before plea, demurrer, or answer is filed, be taken as confessed." The meaning of which is, that a *pro confesso* may be taken at the rule day succeeding the one to which the defendant has been cited, or at any time afterward, provided an answer, plea, or demurrer has not been filed in the meantime. The *proviso* impliedly admits the right to file the answer at any time before a *pro confesso* has been taken. To hold the contrary, would be to hold that if the defendant should permit the rule day following the one to which he has been cited, to pass without answering, that then he would have to wait until the next term of the court and obtain the court's permission before he could answer. The practice has uniformly been otherwise.

The lower court assumed that the defendants had no right to file an answer after the first Monday in May, consequently that at the October term it could treat the case as though no answer had been filed; if it was right in that assumption, then it *could* impose such terms in its discretion as it saw fit; but if the right to appear and file an answer on the nineteenth day of May was not dependent on the permission of the court, then the defendants, at the October term, were not suppliants for the court's bounty, and stood upon their strict legal rights, unhampered by any conditions which the court might seek to impose upon them.

The refusal on the part of the court to sustain the motion to strike from the files was a confession that the answer was rightfully filed. It was a very illogical decision to overrule the motion and at the same time order that the answer should stand filed as of the first Monday in May.

The only cases cited to the chancellor were those of Reynolds *v.* Nelson, 41 Miss. 83; Pool *v.* Hill, 44 Miss. 306, and McAdory *v.* Turner, 66 Miss. 667; the two latter were cases at law, the former was a case where the court had granted leave to the defendant to answer within a given time as of the term at which the leave

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was granted. In that instance the court was in a position to impose terms; it had overruled the defendant's demurrer, and in granting him time to answer made it a condition of the grant that the answer, when filed, should stand as though filed at a certain date.

In the law cases, the question was whether the Circuit Court Pleading Act (Code of 1867, p. 603, art. 160; Code 1871, § 631, and Code of 1880, § 1703) placed it beyond the power of the court to allow time to plead after the imparlance term. Neither that question nor the statute under which it was raised is sufficiently analogous to the question and statute now under consideration to furnish any guide to us in reaching a conclusion.

The one statute is that "the defendant shall plead on or before the second day of the term or within such other time as the court may allow, and that for want of such plea judgment by default may be entered. And that the court shall require that the issues of fact be made up at the imparlance term. This statute not only requires the defendant to plead on of before the second day, but it is otherwise so worded as to give plausibility to the construction that under it the court has no power to allow the defendant to plead out of time, even though a good excuse be made for not pleading sooner. It would be impossible to draw the implication from that statute that a defendant might plead after the second day without permission of the court — might plead at any time before a judgment by default had been taken. Not only are sections 1703 and 1889 of the Revised Code distinguished by being part of two systems of procedure radically different, but section 1889 contains no such direction to the Chancery, as to the Circuit Court, to see that an issue of fact is made up by a certain time.

The complainant in the chancery cause cannot complain that the construction contended for operates to delay the progress of his suit; if he fails to take his *pro confesso* at the proper time the suit is delayed by his *laches;* the policy of the law is general, and of this statute (1889) in particular, is that complainants shall be prompt in proceeding with their causes, as well as that defendant shall answer promptly. By failing to answer on or before a certain day the defendant runs the risk of having the complaint taken for confessed, and by failing to take his *pro confesso* at the earliest time permissible, the complainant runs the risk of having an answer put in; the right given to each party forces the other

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to be prompt. This reasoning applies with greatest force where the defendant has been cited to a rule day; the clerk, at rules, has no power to extend the time for answering (Code, § 1816), so that the defendant's only opportunity for an extension is the failure of the complainant to take a *pro confesso*.

We conclude then, that on the nineteenth day of May, no *pro confesso* having been taken or applied for, the defendants had a right to file their answer as of course, without the permission of the court, and that under section 1941 of the Code, the complainant, having set the cause for hearing before five months from the filing of the answer had elapsed, thereby admitted the answer to be true. And so, at the hearing, it was proven by competent evidence that the mortgage debt had been paid in full — the defendants needed no other proof — the bill should have been dismissed.

Brief of St. John Waddell:

The chancellor in this case was simply acting under the general power given him by law to control all pleadings in his court so as to prevent delay and injustice.

Section 1881 of the Code of 1880, speaking of amendments in the Chancery Court says: "Amendments shall be allowed in the pleadings and proceedings on liberal terms to prevent delay and injustice."

Again this court has said in the case of Kimbrough *v.* Curtis et al., 50 Miss. 117, that "The practice in the State under the liberal rules of amendments of pleadings authorized by statute is to entrust to the courts of original jurisdiction a very large discretion over the pleadings." See case cited, Smith *v.* Harrington, 49 Miss. 771.

Now let us see from the record if the chancellor had any grounds to act upon in ordering the answer refiled as of the first Monday in May, 1885, so as to prevent "delay." Appellants were cited to answer on first Monday in April. Under the statute (§ 1889, Code of 1880), they had until the first Monday in May in which to file their answer, but they did not answer until the nineteenth, or just fifteen days after the first Monday in May. Now had they answered as required by law, on the 1st Monday in May, 1885, then the five months allowed by section 1941, Code of 1880, for taking depositions would have expired by the October term, 1885, of the Chancery Court, and appellee could have set his cause down for hearing and obtained his decree. But at this term

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of court, appellants must have sought to "tide over" by delaying the filing of their answer for fifteen days and their filing merely a delay plea of payment. Thus it is seen that the act of appellants in delaying their answer for fifteen days would have worked a great delay and hardship on appellee for as the answer stood he could not have set the case for hearing as the five months would not have expired until after court would have adjourned and consequently he would have had to wait six months longer for a decree for his money. Therefore, to prevent this delay and hardship on appellee, the chancellor in the exercise of the discretion imposed on him by law, and by virtue of his authority to control the proceedings in his court, ordered the answer refiled as of the first Monday in May, the time when it should have been filed under the law.

To this action of the chancellor the appellants excepted, but they make no showing of any injury resulting to them from such ruling. They make no application for a continuance. They do not show that they could change the result of the hearing of the case at a future time, nor do they make any excuse for not answering on or before the first Monday in May, but rest upon the delay gained by failing to answer within the time required by law.

It is contended that this court cannot judge of this question as the lower court did who acted with all the facts, parties, and circumstances of the case before him, in the exercise of his discretion in such matters, and that this court will not reverse the lower court unless it plainly appears that injustice has been done, for it is presumed that the chancellor acted rightly under all the facts and circumstances unless the contrary plainly appears. Bryant *v.* Rosenbaum, 62 Miss. 191.

Counsel for appellants insist that as a *pro confesso* was not taken that the right to answer continued unprejudiced. We think that this is error for this reason. Section 1889, Code of 1880, says that answer *shall* be filed on or before the rule day succeeding the one to which process is returnable. This language is positive, and negatives the idea that a defendant can answer when he chooses. Also section 1890 of Code of 1880 says that additional time to answer may be allowed by the court on cause shown. These two sections construed together must mean that a defendant must answer in the time required by law, and if he fail to do so, then his answer is under the control of the court, who is invested with

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discretionary power over it to prevent delay and undue advantage. See sections above referred to. McAdory *v.* Turner et al., 56 Miss. 666; Pool *v.* Hill, 44 Miss. 306.

Again, counsel for appellant contends that appellee was guilty of laches in not taking *pro confesso* on first Monday of May. This position is manifestly wrong, for appellants had all of that day in which to file an answer, and a *pro confesso* could not have been entered until the first Monday in June, as the clerk is only authorized to enter decrees of confession on rule days. See section 1815, Code of 1880. And, therefore, appellee could not take a decree *pro confesso* in vacation. We contend that the chancellor acted with all of the circumstances and facts of the case before him, and such as of necessity cannot be presented to this court by the record, and as no showing has been made of any injury to appellant by the chancellor's ruling, this court will not disturb the decree, as it is presumed the grounds upon which his ruling was based were ample and sufficient.

Brief of L. Brame:

It is true that there is no express provision, as in the Circuit Court Law, that issues shall be made up in the Chancery Court ready for trial at the second term, but, construing the several sections which relate to this subject together, two objects are manifest:

1. That both complainant and defendant shall have *five months* within which to take testimony before the hearing.

2. That either party may *compel* a hearing as soon as the five months shall expire. * * *

If a defendant refuses or neglects to answer within the time allowed by the statute or the express leave of court, it ought to be sufficient for his temerity that the complainant does not avail of the right to take a *pro confesso*. If the complainant is thus lenient, the defendant should congratulate himself that he has not been summarily disposed of; certainly he ought not to avail of the complainant's liberality and at the same time take advantage of his own default, thereby placing the complainant in a worse condition than if he had obeyed the law by filing his answer in time. * * *

The provision in section 1889 that the complainant may take a decree *pro confesso* at the time stated, "*or at any time afterward, before plea, demurrer or answer is filed,*" is not intended to allow

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the defendant to answer at any time with impunity. The main object is to prevent complainant from being debarred from taking the *pro confesso* merely by reason of the fact that he does not see proper to take it at the first opportunity. * * *

* * * In construing the statutes and settling matters of practice, the court will be greatly influenced by considerations of what would be the best policy. In no way can the general objects of the law as above stated be accomplished than by the construction adopted by the chancellor.

OPINION.— ARNOLD, J.:

The answer of appellants was filed out of time, and it was subject on that account to be stricken from the file on motion.

If it had been so stricken out, leave should have been granted, on proper showing, to have refiled the answer upon reasonable terms.

In effect this is what was done, and as it does not appear that any injustice was occasioned by the action of the court, the decree of the chancellor is

Affirmed.

WILLIAM EVANS *v.* STATE OF MISSISSIPPI.

Criminal Law — Evidence — Incompetent Testimony.

In the trial of one indicted for an assault and battery with intent to kill and murder, it is error to permit a witness for the State to testify that he suspected certain persons related to the defendant to have been engaged in the commission of the offense.

Evans was indicted and tried on a charge of assault and battery with intent to kill and murder one Hayes.

The court permitted the district attorney to ask witness Hendricks whether he suspected persons related to the defendant to

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Impressions, opinions, and faint recollections of a witness are inadmissible without the facts on which they are founded. Torrance *v.* Hurst, 1 Walk. 403.

A test of admissiblity of evidence is its relevancy and not its conclusiveness. Everman *v.* Robb, 52 Miss. 653.

A witness must testify from his own knowledge. His statements that so far as he knew or believed the property in controversy belonged to the plaintiff are incompetent. Wells *v.* Skipp, 1 Walk. 353.

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have been engaged in the commission of the offense for which he was being tried. There was objection by defendant.

Over the objections of defendant, the same witness was permitted to testify that, while he did not know, he suspected that persons related to the defendant had taken part in the shooting of Hayes.

From a verdict of guilty and sentence defendant appealed to the Supreme Court.

APPEALED from Circuit Court, Hinds county, First District, T. J. WHARTON, Judge.

Reversed and remanded for a new trial, April 19, 1886.

Attorneys for appellant, J. A. Brown and Calhoun & Green.

Attorney for appellee, T. M. Miller, Attorney-General.

Brief of J. A. Brown:

* * * Cross-examination though within the discretion of the court so far as *relevancy* is concerned yet must be confined to legal questions. This discretion covers objections to the relevancy of the evidence. Suspicions of Hendricks and other witnesses were *incompetent.* Moreover these suspicions and especially the fact that they suspected some one connected with Evans had no bearing upon the credibility of the witnesses or their truthfulness or judgment. These inquiries and the introduction of these suspicions were for the purpose of making the jury believe that Evans was connected with the attempted assassination. The bill of exceptions shows that they were objected to *because they were suspicions* and the court admitted them *without any explanation,* instruction, or otherwise to the effect that they were mere tests of credibility and were not to be received as facts in the case. Moreover the bill of exceptions shows that the defendant afterward asked the court to *exclude the suspicions* from the jury and the court overruled the motion and allowed them to remain as part of the evidence for the jury's consideration. Miller *v.* Smith, 112 Mass. 476; The Elton *v.* Larkin, 5 C. & P. 385. * * *

Not a shadow of doubt exists that Evans would have been acquitted if this by-play had not taken place and the suspicions introduced to the jury. 1 Greenleaf, Evidence, §§ 52, 449.

The only cases in which suspicions are competent are in slander

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or malicious prosecution suits, where the defendant seeks to mitigate damages by showing probable cause for his words or acts. 2 Greenleaf, Evidence, § 458; 1 Greenleaf, Evidence, § 449.

Brief of T. M. Miller, Attorney-General:

* * * I submit to the court whether in view of the instructions given necessitating the exclusion *by evidence* of all reasonable doubt; the exclusion of mere threats as constituting the crime (and in view of the fact that Hendricks said he did not know anything), the statement of his *suspicions* could have been of prejudice to the defendant.

Here was a sworn jury trying a case according to the law and evidence. A mere suggestion of counsel would at once dispel the idea that the suspicion of a witness that some connection of defendant was implicated could be regarded as evidence. It is so extremely unlikely, manifestly so I may say, that a jury would pay heed to such idle talk, that this statement may be safely relegated to the category of impertinent and immaterial for the admission of which courts do not reverse judgments.

The court will observe that the examination of the witness is not set out in the bill of exceptions; further that the witness Hendricks admitted that he had previously said he could put his hand on the person who did the shooting. The cross-examination was designed to bring out what he meant by this statement. The witness might be inquired of touching his suspicions with reference to acts of defendant upon which he based them. When it appeared that his suspicions were based on nothing and did not relate to the defendant nor connect him with the object of his suspicions in the crime, it is difficult if not impossible to conceive that any harm was done by the testimony.

I do not pretend to say that it is proper to prove suspicions of witness in any case involving either the accused or third parties. My contention is that the idea of injury having been done in this case, granting a spark of intelligence or fairness to the jury, by the admission of the evidence is purely frivolous. * * *

OPINION.—COOPER, C. J.:

It was error to permit the district attorney to ask the witness Hendricks whether he "suspected persons related to the defendant to have been engaged in the perpetration of the offense" for which the defendant was on trial. Against the repeated objec-

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tions of the appellant, this witness was permitted to testify that while he did not know, he "suspected" that a person related to appellant had taken part in the criminal shooting of Hayes. These suspicions may have been formed from the merest floating rumors not arising to the dignity of hearsay evidence, or may have been totally unfounded. In any event, or however strongly and honestly entertained by the witness, they were wholly incompetent and the manifest effect was to prejudice the defendant with the jury, and because of its introduction, the

Judgment is *reversed,* and a new trial awarded.

J. M. BUCKLEY *v.* A. L. THORNTON.

Chattel Mortgages — Balance Due — Replevin — Trustee.

Where mortgagor pays all but a small part of the debt when due, and the trustee takes possession of the property, replevin by the mortgagor against the trustee will not lie.

Replevin in justice of the peace court by J. M. Buckley against A. L. Thornton for a bay mare and cow.

From a judgment for plaintiff there was appeal to the Circuit Court. The evidence in the Circuit Court showed that Buckley had borrowed from one Smith $103.79 to pay off a debt due to Haralson, and had executed his note to Smith in the sum of $128.79, due sixty days from date, Smith charging Buckley $25 for the use of the money for the sixty days.

Buckley executed and delivered to A. L. Thornton, as trustee, a deed in trust on one bay mare and one cow to secure the prompt payment of the debt. Plaintiff testified that all of the debt except something over $3 had been paid when due.

Buckley failing to pay this balance, the trustee took the security; whereupon Buckley instituted replevin against the trustee to recover possession of the property.

From a judgment for defendant there was an appeal to the Supreme Court.

To maintain replevin the plaintiff must have the right to the immediate possession of the property sued for. Fritzell *v.* White, 5 Cush. 198; Lloyd *v.* Goodwin, 12 S. & M. 223.

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Points of Counsel.

APPEALED from Circuit Court, Scott county, A. G. MAYERS, Judge.

Affirmed, October 25, 1886.

Attorney for appellant, D. C. Wasson.

Attorney for appellee, J. K. P. Palmer.

Brief of D. C. Wasson:

* * * It seems to me that nothing more is required than an inspection of the record to ascertain that the case ought to be reversed. Buckley testified that the note was given for $103.70, money advanced by Smith to pay Haralson, and $25 interest for sixty days. Buckley testified further that he had paid all the note except $3.79. To otherwise state, he had paid the $103.70 and about $22 of the unlawful interest (more than could have been collected by law unless it can be done in this indirect way). Three questions are to be considered. First, could Buckley by paying off the principal and $22 of the unlawful interest treat the $3.79 balance as paid, and maintain his action of replevin? Second, did Buckley give his consent for Thornton to take the property? Third, admitting that Buckley consented for Thornton to take the property under a mistaken idea of his (B) rights, was he estopped from bringing his action of replevin on discovery of his rights?

As to the first proposition, I maintain that Buckley had a right to pay the principal and treat the $25 usurious interest as paid and bring his action of replevin. Section 1141, Code 1880 (the law under which this contract was made), expressly says: "and if a greater rate of interest than *ten* per cent. shall be stipulated for in any case, *all* interest shall be forfeited." The law itself makes the forfeit and needs no action on the part of the debtor but to show the facts that establish the *fact* that more than 10 per cent. has been incorporated in the contract.

This contract is condemned by law as usurious, and certainly Buckley had a right to so treat it. It seems to me it is beyond dispute Buckley was entitled to maintain this action if it is true he had paid all of the note except $3.79, and as to this there is no dispute. * * *

Brief of J. K. P. Palmer:

* * * The only payment made on the debt as shown by the

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testimony was a note on Fairchild in favor of Buckley for $100. Buckley say that this note was given at the time he gave the note to Smyth for the borrowed money. * * *

If he had paid all of the Smyth note except $3.79, he fails to show at what time he paid, after suit or before, and as this is a fact on which he must predicate his right to recover of the trustee, he should have shown that fact, because his right to recover depends on the facts as they exist at the time of the suing out of the writ, and not at the date that a witness testifies. * * *

OPINION.— COOPER, C. J.:

The plaintiff, by his own testimony, showed that a part of the debt secured by the deed of trust was unpaid, and this being true, he could not recover the property from the trustee.

The judgment is *affirmed.*

ETTIE TOWNSEND *v.* WYATT KENNARD.

Witnesses — Examination of.

Where witness transferred his claim to plaintiff who brought suit on same against the estate of a deceased person, it is proper, on cross-examination, to ask witness the consideration of the transfer.

Proving Claim Against Estate of Deceased Person.

Plaintiff is not a competent witnes in his own behalf to prove his claim against the estate of a deceased person where said claim originated in the lifetime of the deceased.

Same.

In such case, though the proceeding be against certain personalty (which had been set apart to the widow by the appraisers as a part of estate of deceased at the time of his death) plaintiff cannot recover.

The term "claim" is not limited to a fixed debt nor to a demand *ex contractu.* Lamar *v.* Williams, 39 Miss. 342; Rotchschild *v.* Haten, 54 Miss. 554.

In a suit by the representative of the estate, a defendant is incompetent to testify to a contract between himself and a decedent. Otey *v.* McAfee, 38 Miss. 348; Boylan *v.* Holt, 45 Miss. 277.

A party plaintiff who has no beneficial interest in the suit is a competent witness for the usee. Hedges *v.* Aydelott, 46 Miss. 99.

The statute applies where the witness has assigned his claim since the death of the deceased "without recourse" and is being prosecuted by his assignee Reinhardt *v.* Evans, 48 Miss. 230; Jones *v.* Sherman, 56 Miss 559; Gordon *v.* McEachin, 57 Miss. 834.

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Statement of the Case.

Wiatt Kenyard sued Ettie Townsend and Uriah Millsaps, the latter being administrator of estate of L. M. Townsend, deceased, in a magistrate's court for $147.43 for labor for the year 1884, and sought to subject certain corn and fodder in the possession of Ettie Townsend to a lien for the payment of said sum. Plaintiff alleged that certain persons (naming them) claimed an interest in the property, and prayed for a writ of seizure under the statute, the said persons having transferred their claims to plaintiff.

The writ was issued and 200 barrels of corn and 500 bundles of fodder levied upon by the officer, who sold same as perishable property and paid the money over to the circuit clerk, and afterward, on order of court, into the Circuit Court. Defendants executed a forthcoming bond, and Millsaps, administrator, made affidavit denying the debt. There was judgment for plaintiff, and appeal by defendant to the Circuit Court where plaintiff again recovered judgment. Whereupon defendant appealed to the Supreme Court.

During the trial in the court below, counsel for defendant, on cross-examination, asked Elick Robertson, one of the persons transferring to plaintiff, what plaintiff had paid him for his claim. To which question witness replied that it was not a fair question.

Defendant's counsel then asked him if plaintiff gave him anything for his claim, to which witness answered negatively. Counsel then asked witness if it were not a fact that if plaintiff recovered judgment would he not share in same. Plaintiff's counsel objected and was sustained by the court, whereupon defendant excepted.

There was other testimony of a similar nature. Plaintiff

If the assignment be made before the death of the decedent the assignor is a competent witness. Snell *v.* Fewell, 64 Miss. 655.

When the cause of action originated after the death of decedent, the parties to the suit are competent witnesses. Witherspoon *v.* Blewett, 47 Miss. 570.

The original debtor is a competent witness to show that defendant's intestate assumed his debt to the plaintiff and is liable therefor. Sweatman *v.* Parker, 49 Miss. 19.

The term "estate" is used, in its broad and popular sense, to signify all the property of every kind which one leaves at his death; and any right asserted against the estate of a deceased person which accrued to a party by virtue of dealings between him and the deceased cannot be established by

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testified that he worked for deceased during the year 1884, and that deceased was indebted to him in the sum of $33.40 when he died. Defendant objected to this testimony for obvious reasons, and asked exclusion of same. The court overruled the objection and permitted the testimony to go to the jury, to which action of the court the defendant excepted.

The property levied upon under the seizure writ had been set apart by appraisers to the widow of deceased, and was a part of Townsend's estate when he died.

APPEALED from Circuit Court, Copiah county, T. J. WHARTON, Judge.

Reversed and remanded, March 8, 1886.

Attorneys for appellant, W. P. & J. B. Harris, and Harris & Dodds.

Attorney for appellee, H. C. Cohn.

Brief of W. P. & J. B. Harris, Harris & Dodds:

* * * It was clearly competent for the defendant to attack the consideration of the assignment to Kennard. If it was without consideration there were many defenses which could have been made to it, which were cut off by the action of the court in not permitting the witness Elick Robertson to answer the questions of defendant's counsel on that point. This was error, and, for that reason, the case should be reversed.

But the action of the court in admitting the testimony of the

evidence of the living party. Jacks *v.* Bridewell, 51 Miss. 881; Green *v.* Mizell, 54 Miss. 220; Rothschild *v.* Hatch, 54 Miss. 554; Jackson *v.* Smith, 68 Miss. 53.

To exclude a party as a witness to prove his own claim or right, it must be against the estate of a deceased person in the suit in which he proposes to testify. Love *v.* Stone, 56 Miss. 449; Cole *v.* Gardiner, 67 Miss. 670; Jackson *v.* Smith, 68 Miss. 53.

It is not a valid objection that the testimony of the witness will remotely and collaterally contribute to or create a liability that may or may not be vindicated in some other proceeding. Griffin *v.* Lower, 37 Miss. 458; Lamar *v.* Williams, 39 Miss. 342; Faler *v.* Jordan, 44 Miss. 283; Love *v.* Stone, 56 Miss. 449; McCutchen *v.* Rice, 56 Miss. 455; Fennell *v.* McGowan, 58 Miss. 261; Combs *v.* Black, 62 Miss. 831; Cole *v.* Gardiner, 67 Miss. 670.

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plaintiff, Kennard, to establish his own claim against the estate of a deceased person is fatal to the whole case. This testimony should have been excluded. * * *

Brief of H. C. Cohn:

Appellant having assigned only one supposed error and that the refusal to grant a new trial, I take it the court will notice no other.

Should the verdict have been sustained by the court? The proof of the correctness of the account, it is admitted, is not clear or conclusive, but plaintiff did not prove that it was made from the books of Townsend, and no effort was made to show any mistake in the books, they being Townsend's own books, I submit they are sufficient to bind him without *proof* of their correctness.

There can be nothing in the fact that this property had been set aside for the widow, as this suit is to enforce the lien of the laborers and nothing the administrator could do could affect that lien. * * *

OPINION.— CAMPBELL, J., delivered the opinion of the court:

The course of examination of the witness Robertson by the counsel of the defendant below was proper and should have been permitted.

The plaintiff was not a competent witness, for he was testifying to prove his own claim against the estate of a deceased person, which originated in the lifetime of such person. Although the proceeding was specifically against certain things they were part of the estate of Townsend when he died, and had been set apart to his widow as a portion of his estate.

Reversed and remanded for a new trial.

Where the question is one of the admissibility of other evidence — a question to be determined by the court — the statute does not apply. Bookout *v.* Shannon, 59 Miss. 378; Harper *v.* Lacey, 62 Miss. 5.

This section applies although the decedent conducted the transaction out of which the action arises by an agent, who is yet alive and has testified in the case. McCaughan *v.* Hardy, 78 Miss. 598.

Where an equitable assignment of a policy of insurance has been made to a third person the original beneficiary consenting, such original beneficiary may testify against the estate of the insured to the facts constituting such assignment which originated during the lifetime of the deceased, because he testifies to establish not his own but the assignee's claim. Cockrell *v.* Cockrell, 83 Miss. 385.

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B. F. McCRARY et al. *v.* J. C. SANDS & Co. et al.

Certiorari — Liquor License.

Where legal voters and residents of a city sign a counter petition against the issuance of a liquor license by a city board, and signers of the original petition asking for the granting of such license request withdrawal of their names, and the board disregards such counter petition and requests for withdrawal of names, a writ of certiorari is proper to review the action of the board in granting the license.

Citizenship.

In such case where it does not appear that applicants for license were residents of the city, the license is invalid.

J. C. Sands, E. W. Thompson, and others presented a petition to the city council of West Point, praying for license to sell liquors in said city. A counter petition alleging that many of the signers of applicants' petition were not citizens of the State nor city, and numerous requests from the signers of the original prayer for license, asking withdrawal of their names from such petition for license, were filed with the board. The board granted the license as prayed for, whereupon McCrary and others

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The law involved in this case is section 1103, Code of 1880.

In the absence of power conferred by statute or charter, municipal authorities cannot grant and sign bills of exception when exercising the power to grant license to retail liquors. Its decision is final as to questions of fact, though errors of law apparent in the record of the proceedings may be corrected by certiorari. Jane *v.* Alley, 64 Miss. 446.

And since no appeal is provided from the order of municipal authorities, acting under section 1103, Code of 1880, on a petition and counter petition for license to retail liquors, a writ of certiorari may be awarded by the Circuit Court to correct errors of law apparent on the face of their proceedings. Corbett *v.* Duncan, 63 Miss. 84; Loeb *v.* Duncan, 63 Miss. 89.

One pending his petition for license to retail cannot maintain certiorari from a general order refusing to grant any license within the municipality within twelve months, for until there is action on his petition there is no judgment against him which he can have reviewed. Lexington *v.* Sargent, 64 Miss. 621.

None but parties to the record sought to be reviewed can maintain certiorari. Hence, persons, though voters of a municipality, who are not in any way parties to proceeding before the authorities thereof, who are not signers of a counter petition against issuance of license to the applicant, nor of a general petition against the granting of license, are not entitled to have pro-

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petitioned the Circuit Court for a writ of certiorari commanding the city board to send up to the court all the original papers and transcript of all the proceedings before the board, together with the last registration of voters in the city, and prayed that Sands and Thompson be summoned to appear and show cause why their license should not be annulled.

The petition for the writ alleged that the municipal authorities at a special meeting granted the license without the three weeks' publication as required in such cases; that Sands and Thompson were not citizens of the city, and that if the names of the countersigners and those requesting erasure of their names from the petition for license had been counted as against the petition for license that applicants would not have had a majority of the legal voters of the city; and that the board refused to consider the objections to applicants' petition.

Fiat was issued as prayed for, and on hearing the writ was quashed and the cause dismissed, whereupon McCrary appealed to the Supreme Court.

Appealed from Circuit Court, Clay county, W. M. Rogers, Judge.

Reversed and writ quashed, February 22, 1886.

ceedings resulting in a grant of liquor license reviewed. McCreary *v.* O'Flynn, 63 Miss. 204; Lexington *v.* Sargent, 64 Miss. 621.

But if a voter appears and objects to the issuance of license, he may maintain certiorari. McCreary *v.* Rhodes, 63 Miss. 308.

To a writ of certiorari to the authorities of a municipality directing them to send up to the Circuit Court the transcript of the record of any proceedings had before them, the only proper answer is the transmission of such transcript, and any answer touching the merits of the cause will be disregarded. McCreary *v.* Rhodes, 63 Miss. 308.

A license issued on a petition which fails to set out that the applicant therein presented is a "resident" of the municipality for which the license is to be granted, and "of good reputation," is void. McCreary *v.* Rhodes, 63 Miss. 308.

Under section 1099, Code of 1880, a license granted by the board of supervisors to retail liquors is void, unless it be shown to the board, by the petition or otherwise, that the petitioner is a "resident" of the county. And an objection for this, being jurisdictional, may be raised in this court for the first time. McGee *v.* Beall, 63 Miss. 455.

But the license need not specify the house where the liquor is to be sold if this is stated in the petition and order of the board. Goforth *v.* State, 60 Miss. 756.

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Attorneys for appellant, White & Fox, Beall & Bradshaw.

Attorneys for appellee, Barry & Beckett.

Brief of White & Fox, Beall & Bradshaw:

* * * The Circuit Court took this very strange view of the case, that the general petition and the petition of Sands & Co. could not both be brought up by a writ of certiorari, and utterly refused to look at or in any way consider the general petition. This, we think, was error, for in no other way could we get before the court the fact that the city authorities had granted a license to Sands & Co. in violation of law, after a general petition had been filed by a majority of the legal voters asking that no license be granted to any one for twelve months.

If the petition for the writ of certiorari was insufficient in not making a more positive averment that the general petition did contain a majority of the legal voters, that defect could not be reached by a motion to quash, but could only have been reached by demurrer, which, if sustained, would have given the petitioners an opportunity to amend. * * *

There is nothing in the petition to show that they are residents of West Point. We submit that this fact should be averred in their petition to give the city board jurisdiction, for they can only grant a license to residents of the city. § 1100, Code 1880; Tally *v.* Grider, 66 Ala. 119.

Nothing, it is said by the Supreme Court of Alabama in the above-referred-to case of Tally *v.* Grider, can be supplied by intendment. No presumption can be indulged in favor of such a proceeding, which the record or *quasi*-record does not affirmatively prove. This record does not affirmatively prove that J. C. Sands & Co. are residents of West Point. * * *

Brief of Barry & Beckett:

This is a certiorari from the proceedings of the municipal authorities of West Point granting a retail license to J. C. Sands & Co. * * *

The writ of certiorari was granted in vacation and without notice. The petition for certiorari does not state that the facts alleged appear by the record of the proceedings sought to be reviewed. * * *

The writ might be granted at any time before or after final judgment, and parties might be seriously damaged by having the

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proceedings interrupted. It operates as a supersedeas. Rapalje & Lawrence Law Dictionary, title, "Certiorari."

The petitioners were not parties to the proceedings below, and hence had no interest. They were not even in the position of taxpayers who have an interest, but only such as is common to other taxpayers, and, therefore, not entitled to the writ. In this case there is an utter want of interest. Cresswell *v.* Commissioners Green County, 24 Ala. 282–284; Benton *v.* Taylor, 46 Ala. 388; Jones *v.* Black, 48 Ala. 543, 544; Ex parte Stroback, 49 Ala. 444, 445; Garnett *v.* Haynes, 23 Miss. 600–603; Grand Gulf Bank *v.* Archer, 8 S. & M. 173, 174; Ex parte Lester, 77 Va. 663, 676, 679; Iske *v.* City of Newton, 54 Iowa, 586; Doolittle *v.* Supervisors, 18 N. Y. 155; Roosevelt *v.* Draper, 23 N. Y. 323, 324; Harkness *v.* Water Co., 26 Me. 353, 356; Strong *v.* County Commissioners, 31 Me. 578–580; Davis County *v.* Horne, 4 G. Greene (Iowa), 94, 95; Taylor *v.* Town, etc., 88 Ill. 526–528; Schuster *v.* Supervisors, 27 Minn. 253–255; Watson *v.* Medical Society, 38 N. J. Law, 377–381; 44 Barb. 467; 45 Barb. 164; 23 Wend. 288, 289; 62 Iowa, 501, 502; 37 Iowa, 91, 92; 5 Kan. 519–525; 56 Vt. 54, 55. See further on this point brief in O'Flinn case.

The petitioners were not parties to the proceedings before the board, and hence not entitled to the writ. Deberry *v.* Holly Springs, 35 Miss. 387; Davis County *v.* Horn, 4 G. Greene (Iowa), 94, 95; Starkweather *v.* Seeley, 45 Barb. 167, 168.

The petition for certiorari does not state the prohibition petition *was signed* by a majority of the legal voters, but that petitioners "verily believe" it was so signed. This averment is not sufficient. M. & C. R. Co. *v.* Neighbors, 51 Miss. 422; McAlister *v.* Clopton, 51 Miss. 257.

Besides the action of the board on the prohibition petition could not be reviewed or attacked in this proceeding on the retail petition. It is a misjoinder. Cresswell *v.* Green County, 24 Ala. 282–284; 9 Iowa, 583; 61 Iowa, 398.

Petitioners should, if entitled to the writ at all, have exercised diligence in suing it out, and not have waited till the license issued, money was paid, etc. The court has a right to look into the surrounding circumstances and refuse the writ if it will work injustice or injury. 2 Wait's Actions & Defenses, 136, 138; 3 Der. 528; 1 Blackf. 414; 8 Yerg. 162, 222; 82 N. Y. 508; 132 Mass. 43; 117 Mass. 565, 566; 112 Mass. 214; 20 Pick. 71; 3 Mass. 407; State *v.* Logan, 43 N. J. Law, 421.

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As the writ, as we have shown, can be granted at any stage of the proceedings before the board (Rapalje & Lawrence's Law Dictionary, title, "Certiorari"), it might seriously impede and obstruct the board in their administration of the affairs of the public and of the town, and should not be granted in vacation or without notice. 15 Wend. 206, 207; 9 Wend. 433; 112 Mass. 214; 6 Mass. 72.

The petition for certiorari should make out a case, and allege that the facts stated appear of record in the proceedings sought to be reviewed. 67 Me. 39; 118 Mass. 564; 2 Wait's Actions & Defenses, 141.

No good cause shown. Certiorari does not lie to the action of the board in granting a license to retail. When the retailer produces to the board a proper petition and complies with the law, the act of granting a license is ministerial. If it is improperly granted, the party can be indicted. It is no protection. Intendent, etc. *v.* Kane, 2 Jones L. (N. C.) 288; Regina *v.* Overseer, 14 Eng. L. & Equity, 145.

OPINION.— ARNOLD, J., delivered the opinion of the court:

The opinions in McCrary et al. *v.* T. O'Flinn, and McCrary *v.* Rhodes and Silk dispose of this case. Appellants, as legal voters and residents of West Point, were signers of a general petition against the issuance of license to sell liquor in the city which, it is alleged, have been disregarded by the mayor and selectmen in granting license to Sands and Thompson. Under the circumstances, it was competent for appellants to prosecute a writ of certiorari to review the action of the mayor and selectmen in granting such license. But the action of the mayor and selectmen on the general petition against license cannot be reviewed in this cause and leaving that out of view and confining our examination to the record of the proceedings of the municipal authorities in granting license to Sands and Thompson, we find that it does not appear from the record or from the petition of Sands and Thompson for license that they or either of them were residents of the city of West Point. This rendered the action of the mayor and selectmen, in the premises, invalid, and the license issued, void, for reasons stated in the opinion in B. F. McCrary et al. *v.* Rhodes and Silk et al., above referred to. The judgment is reversed and the proceedings of the mayor and selectmen as to the license granted to Sands and Thompson are quashed and held for naught.

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F. W. DUNTON *v.* T. A. SHARPE.

Landlord and Tenant — Lease — Rent Notes.

In a contract of lease of lands for a term of three years, notes for each year's rent being given, with a provision that in case of overflow from a river, lessee should be entitled to a credit on the notes for whatever damage may be done his crops by reason of such overflow, *Held*, that said notes were not given in purchase of a term of years, but to evidence the sum to become due each year, subject to diminution by reason of such overflow.

Promissory Notes — Where Payable.

In the absence of proof showing in what State rent notes for lease of lands were made and payable, the notes will be assumed to be payable in the State where the lands lie.

Mortgages — Tenements and Hereditaments — Rents.

A mortgage carrying an express grant of lands, with the provision "tenements, hereditaments, and appurtenances thereto pertaining," conveys the rents to the mortgagee as hereditaments.

In such case, the rents having passed to the mortgagee, they pass from him to a purchaser under foreclosure proceedings, and, as against the assignee of the rent notes who took them after the execution of the mortgage, such purchaser is entitled to them.

Several issues were made up and decided by the court in this case.

Riley Brothers & Baer instituted attachment against Mrs. Ella M. Reddick, and garnished Maynard & Yerger, seeking to bind whatever sum might be due by garnishees to debtor by reason of certain rent notes executed as stated below.

George T. Mitchell instituted similar proceedings against Mrs. Reddick and garnished Maynard & Yerger.

Garnishees answered, denying indebtedness to defendant at time of, and since, service of writ upon them. Also denied possession of any effects of defendant at time of, or since, service of writ; and alleged that they knew of no other person indebted to, or having effects of, defendant, at time of, or since, service of garnishment writ. Garnishees further answered that under the firm name of Maynard & Yerger, they had leased a certain plantation from Mrs. Reddick on December 23, 1882, for the years 1883, 1884, and 1885, and executed rent notes as follows: Four notes of $100 each for the year 1883; two notes for $250 each for

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the year 1884, and three notes for $216.66 for the year 1885; the notes being due November 15th in each year. That the lease was duly recorded, which lease provided, *inter alia,* that any damage resulting to the place or crops by reason of overflow from the Mississippi river should be offset as against said rent notes; that the notes due November 15, 1883, were, long before the institution of the attachment suit, transferred to the Corbin Banking Company and paid; that one B. Richmond attached Mrs. Reddick in justice of the peace court in June, 1883, and recovered judgment against garnishees herein for $75, with stay of execution until the notes for 1884 should fall due; that on December 28, 1883, garnishees received notice by mail from L. R. Grimes of Memphis, Tenn., that he was the owner of one of the notes for the year 1884. Garnishees prayed that said Grimes be made to interplead with plaintiffs and asked compensation for answering.

By leave of court, garnishees filed an amended answer setting up that their lease contained the following stipulation:

"That in case said cleared land shall be overflowed from the Mississippi river during any year of said term, then said Maynard & Yerger may deduct from the rent of that year such damages from loss of crops as shall be adjudged proper." That the lands were overflowed during the year 1884 to their damage in the sum of not less than $250, which they claimed as an offset on the notes for the year 1884. Garnishees further answered that they had been garnished in the case of George T. Mitchell against Ella M. Reddick; that they had been notified that one F. W. Dunton claimed all the rent notes for the years 1884 and 1885 and that one F. A. Sharpe also claimed the rent notes for the year 1885. Garnishees alleged their inability to decide to whom said rent may be adjudged due on their said rent notes, and prayed that the matter be adjudicated by interpleader by and between Mitchell, Richmond, Dunton, Sharpe, and Wiley Brothers & Baer.

Maynard & Yerger filed an additional answer setting up that there was a chancery decree for a sale of the "Black Lake" place of record in Yalobusha county, Mississippi, for the sum of $250; that the same was obtained upon a claim against the estate of one Burke, of whom Ella M. Reddick was one of three heirs-at-law; that said Reddick, prior to the year 1879, she being in

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possession of said place, purchased the one-third interest of S. P. Burke in said place; that on February 15, 1879, Mrs. Reddick gave general warranty deed to one-third of said "Black Lake" place to one Mary E. Hammett, who, upon default in payment of purchase money, lost possession of the property by a decree of the Chancery Court of Coahoma county that the said place be sold for the purchase money; and that garnishee Maynard purchased the place at commissioner's sale in 1882; that Mrs. Reddick was insolvent, and asked that the said claim of $250, which they alleged to be a lien on the said "Black Lake" place, be offset or recouped against the amount that may be found due by them to said Ella M. Reddick; that there was no other estate of the said Burke out of which the said decree for $250 could be made except the "Black Lake" place, and the Reddick place belonging to one Fields.

On the issue in the case of Riley Brothers & Baer *v.* E. M. Reddick, and F. W. Dunton *v.* F. A. Sharpe, the court (jury being waived by agreement) found the facts to be that:

On December 28, 1882, Ella M. Reddick leased certain lands to Maynard & Yerger for the years 1883, 1884, and 1885; that for the year 1885 lessees executed and delivered three notes for the sum of $216.66 each, due November 15, 1885; that the lease was filed for record on December 27, 1882; that on January 31, 1883, Ella M. Reddiek executed to Sherwood, trustee, a trust deed upon the lands to secure certain indebtedness. The trust deed was filed for record February 6, 1883; that trustee's beneficiaries had notice of the lease at time of execution of trust deed; that on June 2, 1883, Mrs. Reddick assigned said notes to F. A. Sharpe for the sum of $552.60; that on June 2, 1884, Sherwood, trustee, sold the land to F. W. Dunton, who purchased at trustee's sale with notice of the assignment of the notes to Sharpe.

The court held that at the time of the execution of the trust deed, the lease for three years had been made, and that the trust deed conveyed only the reversion after the expiration of the lease.

The court further held that the transfer of the rent notes for the year 1885 having been made for valuable consideration prior to the purchase and sale under the trust deed, that F. W. Dunton became entitled only to the reversion and not to the rents.

On the issue joined between Riley Brothers & Baer *v.* F. A. Sharpe, the court found the facts, as to conveyances, dates, and

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dates of filing for record, etc., to be the same as in the case just stated, and that the attachment was sued out on November 16, 1883, by Riley Brothers & Baer against Mrs. Ella M. Reddick for $161.80, and that on November 20, 1883, Maynard & Yerger were, under said attachment proceedings, garnished. The court held that the assignment of the notes having been made prior to the service of garnishment, for valuable consideration, that Maynard & Yerger, at time of garnishment service, were liable to Sharpe, assignee of said notes, and not to E. M. Reddick or the attaching creditors.

On issue joined between Maynard & Yerger *v.* F. A. Sharpe, the court found the facts to be as follows:

The "Lake Place" in Coahoma county, containing 1,254 acres, formerly belonged to Mrs. M. Burke, who devised the land to Mrs. Ella M. Reddick and two others; that Mrs. Reddick and S. Burke, under the will provisions and by death of the other devisee — his interest descending to them — became the owners of the place.

That S. Burke's interest was sold under execution against him and bought by one Goodbar; that Robert Reddick, Mrs. Reddick's husband, bought from Goodbar; that said Reddick and wife conveyed by general warranty 582 acres of this place to Mrs. Hammett, said part being the part now owned by Maynard & Yerger; that Mrs. Hammett failing to pay for the land, it was sold under decree of Chancery Court for the unpaid purchase money. Maynard & Yerger purchased at this sale; that Yerger afterward conveyed to Maynard; that Mrs. M. Burke died in Yalobusha county, and that a decree was rendered in said county about 1879 for $250, and that Maynard had not paid the $250, but claimed the right to set off or recoup the amount of this decree against the notes held by Sharpe.

The court held the claim of Maynard not a subject of recoupment, as it arose out of a separate and distinct transaction.

That said claim was not a subject of set-off, as it was not such a definite and ascertained claim as might be the subject of a cross-action; that to ascertain the amount due Maynard, the court would have to proceed to ascertain and apportion the amount due by him on the decree of $250 against the "Lake Place," which was outside the court's jurisdiction; that it did not appear that Maynard had been evicted or sustained any injury, and that an-

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swer of Maynard set up no legal defense and that Maynard & Yerger were liable to Sharpe for the amount of the notes with interest from maturity.

On all these issues there was judgment accordingly. Motion for new trial was overruled, whereupon Dunton appealed to the Supreme Court.

APPEALED from Circuit Court, Coahoma county, W. S. FARRISH, Special Judge.

Reversed and judgment here, May 17, 1886.

Attorney for appellant, Frank Johnston.

Attorneys for appellee, Calhoon & Green.

Brief of Frank Johnston:

Dunton was the purchaser at the mortgage sale. And Sharpe is the assignee of the rent notes, falling due long after the date of the sale under the mortgage.

Rent is an incident to the reversion and must follow the nature of the land out of which it is reversed. Taylor on Landlord and Tenant, § 154. * * *

The common-law doctrine on this subject prevails extensively in the United States, and on a lease made prior to the mortgage, as the legal title vests at once by virtue of the mortgage, the mortgagee as assignee of the reversion is generally entitled, without any attornment, to collect rent from the date of the mortgage, after giving notice, subject only to the qualification that the rent has not already been in good faith paid to the mortgagor. * * *

In Bloodworth *v.* Stevens, 51 Miss. 481, Judge Simrall delivering the opinion of the court said: "The rule here is as at common law, that rent due at the time of the death of the lessor goes to his personal representatives, but rent which accrued afterward follows the reversion as an incident and goes to the heir." * * *.

A grant by mortgage, there being a pre-existing lease, transfers to the mortgagee the reversion to which the *rent* is incident. And on notice to the lessee the mortgagee will take all rents that become due, after the date of the conveyance and notice.

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But, on the other hand, rent due and in arrear at the time of the mortgage does not pass by the conveyance, but is a mere chose in action. * * *

At common law the mortgagee could enter at once or bring ejectment, or by notice acquire the right to take the rents. * * *

According to the Mississippi law of mortgages, the rents would thus pass with the mortgage of the reversion, subject only to the modifications made by our law, that the mortgagee could not enter before condition broken.

Subject to these requirements the rents would go with the mortgage deed, as part of the security.

In a word, it would be a conditional assignment of the rent as an incident to the reversion just as it is a conditional conveyance of the reversion intrinsically. * * *

Brief of Calhoon & Green:

* * * The point to be decided here, on the interpleader between Denton, the purchaser of the lands at the foreclosure sale, and Sharpe, the assignee of the rent notes, is, which of them is entitled to collect the amount of the assigned rent notes from Maynard & Yerger, the lessees.

Maynard & Yerger undoubtedly owned the three years' term, a mere chattel, by purchase from Mrs. Reddick for the notes given to her before any mortgage. These notes were negotiable and she assigned them. * * *

Suppose that Maynard & Yerger had paid the notes to Mrs. Reddick after the mortgage, but before its foreclosure; would they have been protected? If yes, it follows that Sharpe is. Why would they not have been protected in payment to her? By all the Mississippi authorities the mortgagor is the owner until condition broken. If she was the owner she could receive payment and give quittance.

If she could receive and acquit, she could assign the notes, and when she assigned them for value, this was a payment by the lessees, so far as she was concerned. * * *

It will be found that all the cases hold that the mortgagee cannot sue the mortgagor for rents paid by the tenant before foreclosure.

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OPINION.— COOPER, C. J., delivered the opinion of the court:

The question whether one purchasing a term in lands and paying therefor in cash or negotiable paper upon which he might be held by any third person into whose hands it might come, may be liable also to the assignee of the reversion, is not presented by the record in this case. Looking to the contract of lease it is apparent that the notes were not given in the purchase of a term of years, but to evidence the sum to become due for each year for the rent of that year and subject to diminution by reason of any injury which might be suffered by the tenants in any year from an overflow of the demised lands. Whether the tenants would be protected as against the reversion, if it appeared that the notes given by him were executed or payable in a State in which commercial paper was governed by commercial law, is also a question not presented, since it does not appear in this case where the notes were made or payable, and in the absence of such proof we must assume them to have been payable in this State where the lands lie.

Aside from these inquiries which are suggested by counsel, it seems to us to be obvious that by the very terms of the mortgage executed by the landlord, the rents passed to the mortgagee, for by the mortgage not only is there an express grant of the lands but also of the "tenements, hereditaments, and appurtenances thereto pertaining," and rents are hereditaments. The rents having passed to the mortgagee they, of course, passed from him to the purchaser under the foreclosure proceedings, and as against the assignee of the notes who took them after the execution of the mortgage, such purchaser is entitled to them.

We desire to say we know no statute authorizing an interpleader in a court of law between two claimants to a fund not in court, but since the issue was made up and tried in the court below, without objection, and since none is made here, we dispose of the case on its merits.

The judgment of the court below will be reversed and a proper judgment entered here in favor of the appellant against Maynard & Yerger, the garnishees, with costs against Sharpe, the appellee.

Reversed.

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B. M. LANGFORD *v.* T. H. WEATHERSBY et al.

Deed of Trust — Void for Uncertainty.

A deed of trust that describes personal property as "one hundred and fifty head of sheep, three milch cows, and one yoke of young oxen," is void for uncertainty.[1]

Same — Errors Corrected.

A mistake in the preparation of a trust deed that makes the "grantor" the "grantee," but which is duly signed and acknowledged by the *intended* grantee, will be corrected by a chancery proceeding.[2]

A petition was filed in the Chancery Court of Madison county by plaintiff, seeking to enforce a deed of trust intended to have been given to plaintiff by F. O. Langford to secure a debt of $250. In said trust deed F. O. Langford is made the grantee and plaintiff grantor, but same was duly signed and acknowledged by F. O. Langford. This trust deed was given on certain land in the city of Canton, and on "one hundred and fifty head of sheep, three milch cows and one yoke of oxen." Kiefer & Co., one of the defendants, obtained a judgment against F. O. Langford for $125 and had execution levied on 115 sheep belonging to said

1

A description of property in a trust deed conveyed as the grantor's "entire interest in twenty-five bales of cotton raised by them and any hands they may employ during the year 1892 on land belonging to them or any other land they may cultivate during said year" is void for uncertainty and cannot be aided by proof that less than twenty-five bales were, in fact, raised by the grantors or their hands during said year. Draper *v.* Perkins, 57 Miss. 277, overruled. Redfield *v.* Montgomery, 71 Miss. 113, 14 So. 199.

While it is difficult, if not impossible, to describe live stock in a writing, so as to identify the property without resort to evidence *aliunde*, a mortgage of such property must mention some fact or circumstance connected therewith, which will serve to distinguish it from all other property of the same kind. A mortgage of "thirty head of cattle, three horses, and two mules," without other description, is void. Kelly *v.* Reid, 57 Miss. 89.

Hence, "one bay mare," with nothing else to identity the animal, is an insufficient description in a trust deed, and the instrument is void as to a purchaser for value who has no notice other than that constructively afforded by the record of the deed. Cowden *v.* Lockridge, 60 Miss. 385.

"One four horse iron axle wagon," without designation or location or other description, is a void description in a trust deed. Nicholson *v.* Karpe, 58 Miss. 34.

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F. O. Langford, and the same were advertised for sale. Whereupon plaintiff enjoined said sale and joined Kiefer & Co., parties defendant. A demurrer was filed by said defendant on the ground "that the trust deed which is the basis of complainant's claim is void for uncertainty," and on the hearing thereof was sustained by the chancellor, from which plaintiff appeals.

APPEALED from Chancery Court, Madison county, E. G. PEYTON, Chancellor.

Affirmed in part and reversed in part, April 28, 1884.

Attorney for appellant, John Handy.

Attorney for appellee, Robt. Powell.

Brief of John Handy:

Keifer Brothers, on October 26, 1884, obtained judgment of Circuit Court of Madison county, in their favor against Fannie O. Langford, for $125 and costs of suit. Execution issued which was levied by Weathersby, sheriff, on 150 sheep, as the property of said F. O. Langford. Prior to the rendition of said judgment, on 23d January, 1883, said Fannie O. Langford executed a deed

A description in a trust deed of property as "being in Attala County, Mississippi, and described as follows: one boiler and engine and saw mill, one log cart, one cut-off saw, one gummer and tools, belonging to the mill," is void for uncertainty. Allen *v.* Dicken, 63 Miss. 91.

2

Palpable mistakes in writings will be corrected for the purpose of carrying out the intention of the parties; but the proof of the mistake must be clear and beyond doubt. Harrington *v.* Harrington, 2 How. 701.

The parol proof to correct a mistake is received with caution and distrust. Lauderdale *v.* Hallock, 7 S. & M. 622.

The correction of the mistake will be made between the original parties to the contract and those claiming under them in privity as heirs, devisees, legatees, voluntary grantees, judgment creditors, or purchasers, with notice of the mistake. Simmons *v.* North, 3 S. & M. 67.

Equity will reform a written instrument which through fraud, accident, or mistake in drafting it, does not express the actual contract. Norton *v.* Coley, 45 Miss. 125; Cummings *v.* Steele, 54 Miss. 647.

In such case parol evidence is admissible, and reformation may be had whether the agreement or writing be executed or not. Dunbar *v.* Newman, 46 Miss. 231; Insurance Co. *v.* Hoffheimer, 46 Miss. 645.

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in trust to W. W. Evans for the benefit of B. M. Langford, complainant, to secure the payment of money loaned to her by said B. M. Langford. By said deed "150 head of sheep, three milch cows, and one yoke of young oxen," and a certain lot of ground in Canton were conveyed. In the body of said deed B. M. Langford is, by mistake (as the bill alleges), described as the party of the *first part,* and said F. O. Langford as the party of the *third part,* and the deed on its face recites that the party of the first part conveys, etc., for the benefit of the party of the third part, which, *the bill states,* is precisely the reverse of what was the real state of the case, and what the parties intended to do.

This transposition of the parties, by mistake, runs through the body of the deed until the "testimony" part of it, in which Fannie O. Langford is, for the first time, properly described as the party of the *first part,* and her name is subscribed to the deed, and it was acknowledged by her as her act and deed, and by her alone so signed and acknowledged.

B. M. Langford could not, nor could his trustee, proceed at law to replevy the "150 head of sheep" levied on. Admitting that the deed, so bunglingly drawn, was sufficient in other respects, the description of the sheep ("150 head of sheep") was too uncertain to risk a suit at law on it; he was compelled to ask chancery to reform the deed, and to enjoin the sale by the sheriff. See Reid *v.* Kelly and subsequent cases in our reports as to the insufficiency of such description.

The bill alleges an insufficient description not only of the *sheep,* but of the *cattle* embraced in the deed. And the prayer of the bill is that the sale of the *sheep* be enjoined; that the mistake in the deed as to the cattle (cows and oxen), as well as the 150 head of sheep, be corrected, and that the deed be reformed not only in respect to the uncertain description of property, but also in reference to the uncertainty (if it should be so considered) as to the party for whom and the party by whom the deed in trust was made. To this bill there was a demurrer which was sustained by the court and the bill was ordered to be dismissed.

The error is manifest. Admitting that the equity of the bill was not sufficient as to the *sheep* in the hands of the sheriff, it certainly was so as to the cows and oxen, and as to the construction asked for in reference to the description of persons. It should have been retained as to these matters in which Keifer Brothers,

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the creditors, had no interest; the levy being on the sheep only, and being presumably sufficient. But the demurrer is general in its character, and not to any particular part of the bill, or to any particular relief asked for, and being bad as to a part of the bill at least, it was bad as to the whole. Story's Equity Pleading, § 443; Shearer *v.* Shearer, 50 Miss. 113.

The court below ought, therefore, to have overruled the demurrer.

The learned chancellor below read a long written opinion in this case, resting his decision of it solely on the ground that the deed in trust in this case was not indexed as a deed from Fannie O. Langford to Evans, the trustee, and that, therefore, it was no notice to creditors of F. O. Langford. * * *

The point taken by the chancellor is not made by the demurrer, nor was it argued by counsel. It is admitted by us that a general demurrer to a bill, adjudging no causes of demurrer, may be indulged by the court, where upon the face of the bill it is clear that there is no equity in it; this rule does not apply where special causes of demurrer are assigned, lest, as in this case, the opposite party should be surprised by a line of defense not suggested by the pleadings and, therefore, waived.

Two cases are relied on, one in Wisconsin and one in Pennsylvania, to show that if the deed be not indexed, it is not notice, though recorded. These cases are not at hand, and I know not upon what statutory laws of those States they may proceed. But by our statute (§ 1213), it is declared that every deed in trust shall, as to creditors and subsequent purchasers for value without notice, take effect "from the time when delivered to the clerk to be recorded." By section 1223 the clerk is directed to mark upon every deed the very "minute" of the day, of the month, and the year when he received it, and by section 1224 he is directed to index every deed immediately on its receipt. These statutes are directory to the clerk, they impose duties upon him, but they do not change or vary the express declaration of section 1213, by which the grantee's rights are made to depend upon the act of *delivery for record.* When delivery to the clerk is made, the deed takes effect *eo instanti,* and this whether indexed or not, and, I suppose, whether recorded in a book or not. * * *

The court's attention is called to the fact that Fannie O. Langford is a party to the bill as defendant, and that all the defendants

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joined in the demurrer. It was manifestly a good bill as to her, for the purpose of reforming the deed as to the property other than the 150 head of sheep. It was, therefore, error to sustain the demurrer and to dismiss the bill.

Brief of Robt. Powell:

The demurrer in this case presents the question whether the deed of trust, as recorded, imported notice to creditors.

The law requires the clerk to record all instruments offered for record and to have a well-bound book of suitable size and paper of which to make a general index, direct and reversed, on one page or column of which shall be entered in regular alphabetical order, under the appropriate letter, the name of the maker of the instrument showing to whom made; and on the opposite page or column, in like alphabetical order, under its appropriate title shall be entered the name of the person to whom the instrument is made, showing by whom made, and immediately on receipt of any instrument to be recorded the clerk shall make these entries, and after recording the instrument the book and page in which the record is made shall be noted opposite the name thus placed in the general index, both direct and reverse. See § 1224, Code of 1880, also §§ 1225, 1226, 1227.

Where the statute requires an index to be kept by the recorder, a failure to index does not make the instrument operate as constructive notice. Pringle *v.* Dunn, 37 Wis. 449.

It is otherwise if the law does not require an index. Schell *v.* Stein, 76 Pa. St. 398. * * *

But the question might be asked, if the deed be properly recorded and the mistake occurred in the entry on the index-books, who shall suffer, the incumbrancer or third persons who have been mislead by it? The answer is, it is the business of the incumbrancer to see that the registry laws have been complied with by the officer so that *bona fide* purchasers and creditors shall have notice of the incumbrance. "If a mistake occurs to his prejudice, the consequence of it lies between him and the clerk." Frost *v.* Beekman, 1 Johns. Ch. 299.

The clerk in recording the deed in controversy did not commit a mistake, but he discharged his duty faithfully in the premises. It was the mistake of the parties to the deed. It was folly in B. M. Langford to accept a deed of trust which recites that he is

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grantor, that he owes a debt of $250 to F. O. Langford, evidenced by promissory note, and conveys the property in the deed mentioned to W. W. Evans, trustee, to secure the payment of said debt. Throughout the deed B. M. Langford purported to be the *grantor* and F. O. Langford the beneficiary. The deed is signed by the beneficiary and not by the *grantor*. It is, therefore, very imperfect. No actual notice of the contents of the deed is charged in the bill.

By the record of deeds B. M. Langford is held out to the world as the grantor of the deed; it, therefore, manifestly gives no notice to *bona fide* purchasers and creditors that it is the deed of Fannie O. Langford.

OPINION.— COOPER, J., delivered the opinion of the court:

The deed of trust was void for uncertainty as to the personal property and it is not shown that the judgment creditors have any lien on or assert any right as against the land. But the complainant was entitled to the relief prayed as against Mrs. Fannie O. Langford, and the demurrer which was sustained purported to be the joint demurrer of all the defendants. It should have been sustained as the demurrer of Keiffer Brothers, the judgment creditors, and as that of the sheriff, and overruled as the demurrer of Mrs. Langford. Story on Equity Pleading, § 445.

The decree is affirmed as to Keiffer Brothers and Weathersby, and reversed as to Mrs. Langford, who may answer within thirty days after the mandate shall have been filed in the court below. Mrs. Langford will be taxed with the costs of this appeal.

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T. W. HOUSTON *v.* W. W. TOTTEN & BROTHER.

Trust Deed — Void Description of Machinery.

A description in a trust deed of property as being "The property being in the county of Union, State of Mississippi described as follows: 'one twelve-horsepower engine and boiler and one No. 10 inspirator and piping and belting'" is void for uncertainty and extrinsic evidence is not admissible to explain it.[1]

Claimant's Issue — Judgment of Court in.

On claimant's issue for property seized under execution, where the property remains in the hands of the officer it is not necessary to find the value of the separate articles.

W. W. Totten & Co. held a judgment against John A. Cole. Execution was issued on the judgment and some personal property in the possession of Cole was levied on, consisting of an engine, boiler, belting, etc. Appellant, Houston, as trustee in a deed of trust, filed his claim to the property, basing his title on

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A description of property in a trust deed conveyed as the grantor's "entire interest in twenty-five bales of cotton raised by them and any hands they may employ during the year 1892 on land belonging to them or any other land they may cultivate during said year" is void for uncertainty and cannot be aided by proof that less than twenty-five bales were, in fact, raised by the grantors or their hands during said year. Draper *v.* Perkins, 57 Miss. 277, overruled; Redfield *v.* Montgomery, 71 Miss. 113; 14 So. 199.

While it is difficult, if not impossible, to describe live stock in a writing, so as to identify the property without resort to evidence *aliunde*, a mortgage of such property must mention some fact or circumstance connected therewith, which will serve to distinguish it from all other property of the same kind. A mortgage of "thirty head of cattle, three horses, and two mules," without other description, is void. Kelly *v.* Reid, 57 Miss. 89.

Hence, "one bay mare," with nothing else to identify the animal, is an insufficient description in a trust deed, and the instrument is void as to a purchaser for value who has no notice other than that constructively afforded by the record of the deed. Cowden *v.* Lockridge, 60 Miss. 385.

"One four horse iron axle wagon," without designation or location or other description, is a void description in a trust deed. Nicholson *v.* Karpe, 58 Miss. 34.

A description in a trust deed of property as "being in Attala County, Mississippi, and described as follows: one boiler and engine and saw mill, one log cart, one cut off saw, one gummer and tools, belonging to the mill," is void for uncertainty. Allen *v.* Dicken, 63 Miss. 91.

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the deed of trust. The description of the property in the deed of trust is as follows: "One twelve-horsepower engine and boiler, and one No. 10 inspirator and piping and belting." On the trial of the claimant's issue the claimant offered the trust deed in evidence and oral testimony to explain it. On objection they were excluded on the ground that the trust deed was void on its face. From verdict and judgment for plaintiff claimant appeals.

APPEALED from Circuit Court, Lee county, J. W. BUCHANAN, Judge.

Affirmed, January 18, 1886.

Attorneys for appellant, Allen & Robins.

Attorney for appellee, J. A. Blair.

Brief of Allen & Robins:

* * * The language of the trust deed is something like the descriptions that have already been held void by this court, but it is not quite so vague and indefinite; the trust deed in this case describes the property as a No. 12 horsepower engine, situated in Union county, Mississippi.

The engine is a twelve-horsepower engine and is situated in Union county. Now it is held that this description is so defective as to make it void, but it seems to me that before it could possibly be so regarded the court assumes for itself that there are other twelve-horsepower engines in Union county. I do not think the court is authorized to assume anything of the kind. On the other hand, if we had been permitted I think we could have proven that the engine in controversy was the only twelve-horsepower engine at that time in Union county, so the description of the engine was accurate as if it had said an engine on a certain plantation belonging to a certain individual. Now must the description necessarily negative the fact that there was no other engine in that place belonging to that individual. It is true that the territory of a county is larger than that of an ordinary plantation but the principle is the same, and if one is defective it seems to me the other would be equally so. Then it is not only an

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engine in Union county but is definitely described as a No. 12 horsepower engine in Union county.

Then again the court will see from the trust deed that there is both an assertion of title and possession of this engine in the grantor in the trust deed at the time it is made. He warrants the title he has conveyed and then provides that he is to *hold* the property until default in the payment of the money. These things, it seems to me, would enable us to identify the property by the parol proof offered. There was no patent ambiguity in the description, and the only way any ambiguity could be shown was by proof that there were other engines of that description in that county. These facts, taken in connection with the proof which shows that the trust deed was given for the purchase money of the very property here levied on and that it was the only property of the kind the defendant had, it seems to me entitled us to have the judgment reversed.

The other error assigned was the failure of the court below to assess the value of some of the various articles for which judgment was rendered. This should reverse the case if it affords us no final advantage.

Brief of J. A. Blair:

I have not and perhaps will not see the assignment of errors, but counsel for appellant have told me, and I infer from the bill of exceptions, that the *sole* ground of complaint is the exclusion of the deed of trust in the court below. This was the sole question considered in the Circuit Court.

The proper and sufficient description of personal property in deeds of trust has been so often before this court, and the principles and rules in such cases so often laid down, that nothing new remains to be said or decided, I think.

Here is a judgment creditor as in Kelly *v.* Reed, 57 Miss. 91. Here is an attempt to help the deed of trust by parol testimony as in Cowden *v.* Lockridge, 60 Miss. 387. Here is a defective description of the kind in Nicholson *v.* Karp, 58 Miss. 34. Twelve-horsepower engine is hardly so good a description as "one four-horse iron axle wagon;" certainly it is no better. The description, "twelve-horsepower" goes merely to the power of the engine and does not and cannot serve to identify it from others of the same kind, any more than the description "one bay mare,"

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or "one four-horse iron axle wagon" identifies the horse and wagon from other horses and wagons of that kind. And "one No. 10 indicator" only indicates the size, as four horse does the size of the wagon. If the width of the wagon or the circle of the wheel had been added to the four-horse iron axle, it would have made no improvement. The horsepower of the engine and the number of the inspirator are like adding the height of the horse or the measure around the body. Engines are stamped with the name of the maker and each one is numbered, and no two of the same kind or make have the same number. The inspirator is the pipe which conveys the water to the boiler. Engine, boiler, and inspirator are all, of course, joined together, and are often included in the general name of *engine*.

The terms belting, piping, tongs, etc., are entirely indefinite.

OPINION.— COOPER, C. J., delivered the opinion of the court:

The deed of trust was properly excluded by the court; the description was void for uncertainty. 57 Miss. 91; 58 Miss. 34; 60 Miss. 387.

Since the property attached remains in the hands of the officer it was unnecessary to find the value of the separate articles. This is required to be done only when the claimant has replevied the property in order that he may discharge himself by returning the property to the officer or by paying the assessed value thereof.

Judgment *affirmed*.

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D. J. DAVIS *v.* H. L. DAVIS.

Planting Partnership — Accounting — Tenants in Common.

In a bill filed by a member of a planting partnership against his partner praying for an accounting, the complainant cannot, as tenant in common of the lands, recover from his partner one-half, or any other portion of the crops received by the firm, for the reason that the firm was authorized to receive them; and what portion of the proceeds belonged to complainant can only be determined upon a settlement of the partnership accounts. Complainant's rights as to these crops are determinable by his rights as partner, and not as tenants in common.

In such case where the bill failed to allege that the lands cultivated by defendant, or rented by him, exceeded his proportion of the common lands, the bill cannot be maintained as that of one tenant in common against another as to rents received after termination of partnership.

Pleadings — Answer — Statute of Limitations — Res Adjudicata.

Where answer interposes, among other defenses, that of the Statute of Limitations, a decree dismissing the bill generally is error, for such a decree might be held as *res adjudicata* in another suit. The dismissal should have been without prejudice.

Bill of complaint by D. J. Davis against Hugh L. Davis praying for an accounting of their planting partnership, extending from 1876 to 1881.

From a final decree dismissing the bill and taxing complainant with costs, there was an appeal to the Supreme Court.

The opinion sufficiently states the case.

APPEALED from the Chancery Court, Wilkinson county, LAUCH MCLAURIN, Chancellor.

Reversed for the purpose of dismissing the bill without prejudice.

Appellant taxed with costs of court and court below.

Attorney for appellant, C. P. Neilson.

Attorney for appellee, Hugh L. Davis.

Brief of C. P. Neilson:

The Statute of Limitations is no defense to this action as made out by bill and answer. Sections 2670, 2671, Code of 1880, do not apply. Even did they apply, the plea was informal and insufficient, and should have been stricken out. The section of the

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Code applicable to the case at bar is 2696. Templeton *v.* Thompkins, 45 Miss. 424. * * *

The cause was set down for hearing by the defendant on bill, answer, exhibits, and depositions. The bill was sworn to, its allegations and statements fully made out, and the claim against defendant for the sum of $2,292.50. Some of these allegations were as positively denied by the sworn answer, others were admitted and sought to be avoided by bar of limitation and award. * * *

Brief of Hugh L. Davis:

The bill in this case is a little peculiar. It is simply a declaration in *assumpsit* for the use and occupation of lands of the complainant and for the rent of mules and the proceeds of the sale of mules and of the value of the mules. * * *

The case is before the court upon the bill and exhibit, the answer and exhibits, the deposition of the complainant, and a settling as to whether there shall be an accounting. * * *

The sole question presented at the hearing was, shall there be an accounting on the showing made. To warrant a decree ordering an account to be gone into, there should be shown a previous and *probable* indebtedness. Hunt *v.* Gordon, 52 Miss. 194.

The bilæl should show a title or right in the complainant and a liability in the defendant. 2 Bouvier's Institutes, § 3931. * * *

The bill states that there was a partnership formed. The complainant's deposition contains the same statement; as to the extent of the partnership they differ; the proofs do not correspond with the allegations. The answer denies the partnership as it is alleged in the bill. The answer is evidence. If complainant had desired that it should not be he should have waived an answer under oath. * * *

Again the answer sets up the Statute of Limitations to the partnership accounting. The defense is a good one and the bar complete. The bill alleges a dissolution of the alleged firm in January, 1881; the bill was filed in July, 1885.

Over four years have elapsed from the filing of the bill to the dissolution of the alleged firm. Sections 2670, 2671 are a complete bar. The statute began to run from the day of dissolution. § 2671, Code 1880; 2 Lindley on Partnership, 966, 967 (margin).

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Partnership accounts are included in the Statute of Limitations. The time formerly required to bar them was six years; they came within the exception of merchants' accounts. We make now no distinction. Section 2670 governs all cases of accounts and all verbal agreements or rights accruing under verbal agreements or contracts. Prewit *v.* Buckingham, 28 Miss. 92; Forman *v.* Brooks, 9 Pick. (Mass.) 241, 242; Angell on Limitations, § 69.

Time same in equity as at law, jurisdiction concurrent. Code 1880, § 2695; Wood on Limitations, § 58. * * *

OPINION.— COOPER, C. J., delivered the opinion of the court:

The bill in this case charges that a partnership was formed between the complainant and defendant in the year 1876 for the purpose of conducting a planting business upon certain lands owned by the partners as tenants in common; that the firm was dissolved in 1881 and that the defendant continued to rent or cultivate the common lands during the years 1881, 1882, 1883, and 1884, using in the cultivation of the place certain personal property belonging to the firm, and also that the defendant had sold a large portion of the personalty, converting the proceeds to his own use.

There is no allegation in the bill that there were no firm debts contracted and paid from the proceeds of the crops grown during the partnership, the only allegation being that there are now no firm debts.

The complainant sets forth in detail the quantities of crops raised or received as rents by the firm during the term of partnership from the lands held by the partners as tenants in common, and its object seemed to be to compel the defendant to pay over to the complainant one-half of these crops. There is no prayer for a partnership account; on the contrary, the evident purpose is to recover one-half of all the crops which have been received by the firm because the complainant was tenant in common of the lands on which the partnership business was conducted, and then to recover from the defendant one-half of the crops raised by him since the dissolution of the firm on the ground that he was bailiff to the complainant.

The bill was not maintained as one to settle partnership accounts because it was manifestly not filed for that purpose. The complainant cannot, as tenant in common of the lands, recover from his partner one-half, or any other portion of the crops received by the firm, for the reason that the firm was authorized to

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receive them and what portion of the proceeds belonged to complainant can only be determined upon a settlement of the partnership accounts. His rights as to these crops are determinable by his rights as partner and not as tenant in common. Nor can the bill be maintained as that of one tenant in common against another as to the rents received after the termination of the partnership, because there is no allegation in the bill that the lands cultivated by the defendant or rented by him exceeded his proportion of the common lands. For these reasons the bill was properly dismissed. But since it appears that the defendant interposed, among other defenses, that of the Statute of Limitations, a decree dismissing the bill generally might be held as *res adjudicata* in another suit. We think the dismissal should have been without prejudice.

The decree will be reversed only for the purpose of so dismissing the bill. The costs of this court and the court below to be paid by the appellant.

J. M. TYLER and Wife *v.* WM. G. WHEELER et al.

Creditor's Bill — Improper Parties Thereto.

A creditor's bill was filed, charging fraudulent conveyances from husband to wife; the husband purchased and placed at the mill of the wife certain machinery under circumstances which did not vest title in her: *Held*, that a decree rendered against the wife as a debtor of her husband was void.[1]

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Since section 1178, Code of 1880 (Code 1892, § 2294) became operative no transfer of property between husband and wife is valid as against third persons, unless it be in writing, acknowledged, and filed for record. This is true as to any third person whether creditor or purchaser, and whether his rights accrued before or after the transfer. Gregory *v.* Dodds, 60 Miss. 549.

Such transfer being invalid as to third persons, unless acknowledged and recorded, as to such persons, parol evidence is incompetent to show either the transfer or notice thereof. Montgomery *v.* Scott, 61 Miss. 409; Watkins *v.* Duvall, 69 Miss. 364, 13 So. 727.

Where cotton not produced by the wife, but being a part of her husband's crop, is transferred by him to her, the transfer not being in writing, acknowledged, and recorded as required by section 1178, Code 1880, is void and a purchaser thereof from her acquires no title and cannot maintain an action against another for its conversion. Black *v.* Robinson, 62 Miss. 68.

The fact that a husband, who has bought personal property with his own means, permanently affixes it to his wife's land cannot defeat the provisions

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Statement of the Case.

On January 17, 1885, appellant sued out an attachment on the property of J. M. Tyler, returnable to the Circuit Court of Lincoln county, alleging that appellant, J. M. Tyler, had property or rights in action which he refused to apply to payment of his debts, and that he had assigned and disposed of, or was about to assign and dispose of his property and rights in action with intent to defraud his creditors, and that he had converted or was about to convert his property into money or evidences of debt with intent to place it beyond the reach of his creditors. Upon trial of this cause one Ira W. Tyler interposed a claim for the goods seized under the attachment, and the case being submitted to a jury, the attachment was adjudged to have been wrongfully sued out without damages, and was dismissed. Appellees, W. G. Wheeler, and Cullum and Newman, then instituted this suit as a creditor's bill in the Chancery Court against J. M. Tyler, Ira W. Tyler, and M. L. Tyler, charging that J. M. Tyler had transferred all of his property to his wife and one Ira W. Tyler. It is shown that J. M. Tyler purchased for his wife, M. L. Tyler, a certain mill property, and during the course of his dealings as a merchant in Bogue Chitto, he purchased from J. H. Sasser certain machinery for $600 which was sent to and used at the mill owned by M. L. Tyler, his wife. This purchase from J. H. Sasser was by J. M. Tyler as an individual, he having prior thereto become surety on notes owing by J. H. Sasser to the I. C. Railroad. J. M. Tyler sold and conveyed to Ira M. Tyler all his goods, wares, and merchandise for a consideration of $625, which amount was paid by a debt owing from J. M. Tyler to Ira W. Tyler for labor as a clerk in his store. A decree was rendered by the chancellor adjudging the indebtedness sued on to be due by J.

of section 1178, Code 1880, which makes void as to third persons all transfers of property between husband and wife if not in writing, acknowledged, and filed for record. Arnold *v.* Elkins, 67 Miss. 675, 7 So. 521.

Under Code, § 2294, declaring that conveyances between husband and wife shall not be valid, as against third persons, unless acknowledged and recorded, an unacknowledged deed from the husband to his wife passes no title, as against an attaching creditor of the husband, though such creditor saw the instrument on record, and had actual knowledge of the conveyance before the attachment. Snider *v.* Udell Woodenware Co., 74 Miss. 353, 20 So. 836.

A transfer of property from a husband to his wife otherwise valid, under Code 1892, § 2294, regulating the subject, is not rendered invalid by the fact that suits were threatened or pending against the husband at the time it was made. Donoghue *v.* Shull, 85 Miss. 404, 37 So. 817.

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M. Tyler and adjudging the transfer of the property bought from Sasser by J. M. Tyler to the mill owned by M. L. Tyler to have been fraudulent and decreed the codefendant, M. L. Tyler, liable to complainants for the amount of their debts and all costs of this suit, but limited the total liability of M. L. Tyler to $600, the amount of the fraudulent transfer. From this decree defendants appeal.

APPEALED from Chancery Court, Lincoln county, L. MCLAURIN, Chancellor.

Reversed and judgment here, March 1, 1886.

Attorney for appellant, R. H. Thompson.

Attorneys for appellee, Sessions & Cassedy.

Brief of R. H. Thompson:

* * * As to whether the final decree is not entirely outside of the pleadings is to be determined, of course, by a careful examination of the record itself. * * *

I defy opposite counsel to point out an allegation in the bill to which a transfer of the Sasser machinery from Mr. to Mrs. Tyler can be legitimately referred. Mrs. Tyler has never been called on to present any defense, or to give her version of that matter. If the decree in this cause is correct, it will be idle hereafter to talk of notice being a requisite to the rendition of a valid judgment. The woman was never notified that the transaction adjudged fraudulent by the decree was ever complained of by any one. * * *

The facts do not show a fraudulent conveyance of property within the meaning of section 1843, Code of 1880. In fact, under section 1178, Code of 1880, it is no conveyance whatever. Certainly it is not a fraudulent conveyance, nor do the facts show or constitute a "device resorted to for the purpose of hindering, delaying, or defrauding creditors."

It was well said in the case of Citizens' Insurance Co. *v.* Ligon, 59 Miss. 305, on page 317, speaking of section 1843: "But if, upon final hearing, it shall be made to appear that the conveyances were not fraudulently made, then the complainants, having failed to maintain that phase of their case which alone gives jurisdiction to the court, ought to be remitted to the court of law to establish and enforce their demands."

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This proposition of law applied to this case will reverse it.

Section 1843, Code 1880, was never intended to make anything fraudulent which was not fraudulent before its passage.

When we turn to section 1178, Code 1880, the same observation is applicable. It was never intended to make anything fraudulent which was not fraudulent before its passage.

It is nothing more than the statute which declares written evidence necessary to charge a party on a contract respecting lands. No more can he be said to have fraudulently done that which he has not done at all.

Under it the transfer of the machinery from Mr. to Mrs. Tyler may have been invalid; but it was not fraudulent. The transfer was not made for the purpose of defrauding. There is not a particle of evidence even tending to show a fraud.

A mere intention to convey is not a conveyance; but if the delivery be considered a conveyance there is nothing to show that it was intended to defraud. Had Tyler executed and his wife recorded a bill of sale it would have been perfectly valid under the facts. The consideration for it was $600 to be paid when Mrs. Tyler could, and the machinery was to be used to make money to satisfy the debt due to those from whom it was purchased. Less than this cannot be fraudulent.

Especially Cullum & Newman cannot say it was fraudulent as to them, their debt having been contracted after the transaction. It would probably be invalid as to them under the decision in Dodd's case, but not fraudulent. This same observation applies to a part of Wheeler's debt. The final decree draws no distinctions between debts existing at the time of the transaction and those afterward contracted.

Brief of Sessions & Cassedy:

Various fraudulent conveyances and acts as well as a general purpose on the part of the appellant, J. M. Tyler, to so place his property in the names of his wife and his brother as to avoid his liability to creditors and to protect it against their assaults, is charged by the bill. * * *

But it is objected that the bill is not sufficiently broad to uphold the decree as rendered; that it is a personal decree against J. M. Tyler and Mrs. J. M. Tyler for the amount of complainant's debt. The end attained is not so much objected to as the route by which it was reached. * * *

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In addition to the allegations of the bill, it also, among other things, prays specifically for a personal decree against Mrs. Tyler. * * *

Any bill filed to unearth fraudulent transfers, transactions, or devices cannot, in the nature of things, be always specific as to the exact details of the devices resorted to. To a great extent every bill of this character is a bill for discovery. It is sufficient if the scope and purpose of such a creditors' bill is apparent, and a decree, we take it, should follow for the attacking creditor if it appears from the answer and the proof, either or both, that relief should be granted. * * *

If a debtor secretes personal property and a creditor files his bill alleging removal, transfers, etc., fraudulently, which the debtor indignantly denies in his answer, averring that he has nothing in the world, and the proof happens to show that John Smith owes him for several hundred dollars' property, attempted to be sold him, or declares the whereabouts of secreted property, we would be met, if appellant's theory is to prevail, with the answer, when we come to enter up the decree subjecting the property or enforcing the debt against the would-be purchaser (who has also filed an answer averring the utter poverty of the debtor), with the suggestion: "You have remedy at law. Dismiss your bill and bring suit in the Circuit Court." Give us the beneficent imparlance term and six months for the sheriff to "make the money."

Applied to Tyler's case, where would the property be by that time, and how many prior liens would protect the wife. Section 1178 would be sacredly observed in the meantime, the transfer would not only be in writing, but would be entirely formal, with the regulation number of "whereases" and "aforesaids" and be "duly recorded." * * *

On the question of jurisdiction the following authorities cited: 3 Pomeroy's Equity Jurisprudence, § 1415; 20 Johns. (N. Y.) 570; 1 Cush. (Miss.) 88; 31 Miss. 34; 33 Miss. 163.

OPINION.— CAMPBELL, J., delivered the opinion of the court:

The complaint against the decree as being outside of, and not warranted by the bill, is not well founded.

The bill charges that Tyler had diverted some $1,400 from his mercantile business, as his books show, which went to the improvement of his wife's property or was consumed for her benefit, and thereby made her debtor to Tyler for it.

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Statement of the Case.

The answer denies this charge, and states that one item of $600 charged to the $1,400 account, called the "mill account," is improperly charged thereto, and the history of this item is given. It thus appears that the $1,400 alleged by the bill to have been diverted by Tyler to the use of his wife was made up of an item of $600, among others, and this was, therefore, included in the allegation as to the "mill account" of $1,400.

Upon the facts shown by the evidence of Tyler, we think the bill is maintained, and that his creditors, without regard to date, are entitled to have appropriated to their claims the articles acquired by him from Sasser, and put at his wife's mill, under circumstances which did not vest title in her or make her his debtor for them. Because she is not shown to have been his debtor, the decree was improperly rendered against Mrs. Tyler, and should have been for sale of the goods as the property of Tyler.

Reversed.

E. ZIMMERMAN et al. *v.* PLANTERS' COTTON PRESS, STORAGE AND TRANSFER ASSOCIATION.

Trustee — Power to Compromise Claim.

A trustee acting under a will with power to collect debts may, acting in good faith, compromise or settle a claim in any manner he may deem most beneficial to the estate.[1]

The Planters' Cotton Press, Storage and Transfer Association filed the bill in this case in the Chancery Court of Warren county against E. Zimmerman, M. Zimmerman, and Mrs. Ellen Z. Laird, children of Solomon Zimmerman, to enjoin them from prosecuting an action of ejectment in the Circuit Court against them. From a decree granting the relief sought by complainant, defendants appeal. Affirmed.

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An administrator as a trustee is bound for the ordinary care and caution of a watchful man, and nothing more. Where, by inattention or sloth he loses a debt, he is liable; otherwise, not. Conwill *v.* Livingston, 61 Miss. 641.

An agent or trustee must conduct the business of his trust with fidelity and follow the line of duty prescribed. Pressly *v.* Ellis, 48 Miss. 574.

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Statement of the Case.

The facts are as follows: Appellee purchased the land in controversy in May, 1871, from A. B. Reading and wife. At that time there were two deeds of trust on the property given by Reading. The first dated March 20, 1854, to secure a debt due Solomon Zimmerman, the father of defendants; the second dated May 13, 1871, to E. Zimmerman, as trustee under the last will and testament of Solomon Zimmerman, to secure a balance of $19,907.30, due on the debt secured by the first deed of trust and intendent as a renewal of that instrument. As the time complainants purchased the land from Reading there was an agreement between said Reading and wife and E. Zimmerman, as trustee, by which said Zimmerman was to receive all the purchase money, except about $3,000, which was to be paid to settle another incumbrance. At the same time E. Zimmerman made an agreement in writing, as trustee, with complainant, reciting the purchase of the land, and that said Zimmerman held the deed of trust of 1854, and that complainant, as part of the consideration of the purchase, had executed its three notes in favor of said Zimmerman for $1,555.55 each, all of said date, payable in one, two, and three years; that said notes were the only lien Zimmerman claimed as trustee under said deed of trust and that Zimmerman agreed to release said deed of trust so far as it bound said property. Complainant paid a portion of said sums, but in September, 1876, owed Zimmerman $3,593.13 thereon and executed a note therefor payable in sixty days from date. Complainant paid this note on December 29, 1876, but said Zimmerman had advertised the land for sale under the deed of trust and had sold it on December 20, 1876, and bid it in himself. This is the title which defendants were asserting in the ejectment suit. Defendants denied that E. Zimmerman had, as trustee, the power to make the agreement relied on by complainant. The will of Solomon Zimmerman devised his estate to trustees in trust for his wife and three children, defendants herein, with power to collect the debts due the estate and to reinvest the money in other property in Ohio. The will was probated in Hamilton county, Ohio, and in 1871, E. Zimmerman was appointed trustee in the Probate Court of said county, and on June 26, 1871, he filed a statement of the settlement with Reading, and the agreement with complainants in the Probate Court of Hamilton county, Ohio, and made a final account as trustee. Defendants, Mrs. Ellen Laird and M. Zim-

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merman, appeared in said court and filed exceptions to the final account, but afterward withdrew the exceptions and accepted their part of the money paid E. Zimmerman, trustee, and the final account of said E. Zimmerman was approved and confirmed by said court. From a decree perpetually enjoining defendants from prosecuting the ejectment suit and holding that complainant had a good and valid title to the property in controversy the defendants appealed.

APPEALED from the Chancery Court, Warren county, WARREN COWAN, Chancellor.

Affirmed, May 18, 1885.

Attorney for appellant, M. Marshall.

Attorneys for appellee, Pittman, Pittman & Smith.

Brief of M. Marshall:

* * * It is to be observed that the complainant (appellee) did not allege in terms that the defendants (appellants) Martin Zimmerman and Ellen Z. Laird had full knowledge of all the facts or ratified the acts and agreement of Eugene Zimmerman.

It is necessary to bind them that the ratification should be made with that knowledge. Wharton's Commentary on Agency, etc., §§ 65, 614. And as the appellee must prove that it should have expressly charged it. Story's Equity Pleading, § 28; Puterbaugh's Pleading and Practice, Chancery, p. 44 (at bottom of page); Puterbaugh's Pleading and Practice, Chancery, p. 45 (near the top).

There is here no express allegation of ratification with full knowledge, which the defendants could deny and thus raise the issue as to it, and exact proof of complainant. * * *

In order to meet it, the defendants must rejoin that they had not the knowledge — which is the very thing the complainants should have averred. Tittle *v.* Bonner, 53 Miss. 585.

The bill should set forth, not the evidence, but the facts. Code 1880, § 1868; Story's Equity Pleading, § 257; Mitford & Tyler Equity Pleading and Practice, pp. 64, 136. * * *

Eugene Zimmerman had no power to bind Martin Zimmerman and Ellen Z. Laird by the agreement relied on by appellee to re-

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lease the land (even if the agreement to release the deed of trust of March 20, 1854, should be so extended as to include a release of that of May 13, 1871, and, it will be noticed that the agreement only refers to the former), and no pretence of such authority is shown. * * *

The only thing on which an argument can be based to establish the knowledge of the agreement with the Compress Company is the fact that the trustee reports that he collected of Reading stock and notes of that company. There is nothing to suggest that they were not the property of Reading. Nothing to hint that the Compress Company had bought the land and nothing to hint that they expected a release on any terms. Still less without full payment of the debt secured on it by the incumbrance. * * *

It may be said that Martin Zimmerman and Ellen Z. Laird have received the $17,000 paid by the Compress Company, and are thereby estopped. * * *

In the first place the evidence does not show that they received any of it. Mrs. Laird denies that they did, and Dr. Laird's evidence shows that the stock was taken by Eugene Zimmerman individually, and E. Martin's that it has been canceled.

In the second place the evidence does not show that one dollar was paid on the faith of the ratification by them. * * *

In the third place, in order to claim an equitable estoppel by receipt of the purchase money, the Compress Company must offer to pay the $8,000 and interest from May 26, 1871, the balance of the purchase money agreed on by them, because there is no evidence to support the claim made by the bill that $3,000 or $4,000 was to be paid on the Clark claim, still less that they had a right to pay over to Clark's executor $8,000 of the $25,000 purchase price. Zimmerman's estate had a lien on the land for more than $25,000 and was entitled to it all. * * *

It was nowhere proved that it was agreed that the Clark claim should be paid out of the $25,000. * * *

* * * The estoppel should not be applied by reason of receipt of their money by Ellen Z. Laird and M. Zimmerman, first because the evidence does not prove it, and second, because, having security on the property, they had (there being no agreement with them) a right to it, and third, because appellee has not tendered the balance of the purchase money, $8,000, with interest from May 26, 1871, at 6 per cent., nor shown why it should not

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do so; for it is no excuse for its failure to do equity (as it must when it seeks it) that it has paid it to some other person. * * *

OPINION.— ARNOLD, J., delivered the opinion of the court:

E. Zimmerman, as trustee under his father's will, has authority to collect the debt secured by the trust deed of 1854, and, as an incident thereto, to compromise and settle the same in the manner he deemed most beneficial to the estate of his father. 2 Perry on Trusts, § 482.

The validity of his own appointment as trustee and his *bona fides* in the transaction with appellee could not be questioned in his own behalf, and they are not questioned by the other heirs of Solomon Zimmerman. The record shows that in the exercise of the authority with which he was invested by his father's will and by the law, E. Zimmerman did, upon certain conditions which had been complied with by appellee, agree and promise to release the land in controversy from the incumbrance in favor of his father's estate.

If the land was sold and struck off to him a few days before appellee made the last payment thereon, it appears that afterward, in pursuance of the previous arrangement, he received from appellee the balance due on the contract.

When the power possessed and exercised by him in reference to the collection of the debt due the estate is considered in connection with the approval of the report and account filed by him in the Probate Court of Ohio in 1871, and the subsequent reference to and approval of the same accounts in 1882, in the settlement made by the appellants among themselves, the conclusion cannot be resisted that the proper result was reached in the lower court.

Affirmed.

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H. B. MOSS v. STATE OF MISSISSIPPI.

Indictment — No Offense Charged — Arrest of Judgment.

An indictment charges a defendant with unlawfully selling spirituous liquors in a quantity less than one gallon, there being a statutory provision for a penalty only for selling in quantities less than one "pint."

***Held*, that judgment under said indictment cannot be enforced, and the judgment is arrested.[1]**

H. B. Moss was indicted on September 8, 1883, for retailing spirituous liquors, the indictment reading as follows: "That H. B. Moss, on September 7, 1883, did unlawfully sell to one Peter Sharp spirituous liquors in a quantity less than one gallon, without then and there having a license therefor, in pursuance of the laws of said State, and against," etc. Evidence for the State showed that Peter Sharp purchased of defendant a bottle of bitters which made him drunk, and that "he believed it was nothing but whiskey." This was denied by defendant, and several witnesses were introduced who testified that Sharp had told defendant in their presence that he (Sharp) had never at any time bought any whiskey from the defendant. Defendant was found guilty and fined $200. From which he appeals.

APPEALED from Circuit Court, Choctaw county, C. H. CAMPBELL, Judge.

Judgment arrested and appellant discharged, February 2, 1885.

1

A judgment will be arrested only for such defects as are apparent upon the face of the record itself and which make the proceedings erroneous; and hence no defect of evidence or improper conduct on the trial can be urged in support of it. Corey's Case, 8 S. & M. 573; Frank's Case, 39 Miss. 705.

Where the indictment is essentially defective, after verdict, the judgment will be arrested. Jones's Case, 11 S. & M. 315.

A defendant indicted for retailing liquor in violation of the provisions of the local act of 1884, for Copiah county, cannot after repeal of such act, by virtue of an election under the Local Option Act of 1886, be punished, since the latter act contains no saving of the penal clauses of former statutes. Wheeler *v.* State, 64 Miss. 462, 1 So. 632.

Judgment will be arrested only on some defect apparent in the record. McBeth *v.* State, 50 Miss. 81; Jefferson *v.* State, 46 Miss. 272; Lewis *v.* State, 49 Miss. 356; Lusk *v.* State, 64 Miss. 845, 2 So. 256; Jones *v.* State, 67 Miss. 111, 7 So. 220; Hastings *v.* State, 59 Miss. 541; Merrill *v.* State, 45 Miss. 651; De Marco *v.* State, 59 Miss. 355.

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Attorneys for appellant, White & Fox, and Haden & Dodd.

Attorney for the State not named in the record.

Brief of White & Fox, Haden & Dodd:

* * * The main error relied upon is in imposing a fine and costs on a conviction under this indictment which charged no offense at the time the act is alleged to have occurred. By Code 1880, sections 1097, 1098, 1112, it was made unlawful to sell without license vinous and spirituous liquors in any quantity less than *one pint.* Selling in a quantity greater than one pint was a violation of the Revenue Law, fixing a tax on certain privileges. See Code 1880, § 585.

In 1882 the Legislature repealed the privilege tax on selling liquors, and made an ineffective attempt to amend the Retailing Law. See Acts 1882, page 10.

By this act, the word *pint* was stricken out and the word *gallon* inserted in its stead, in sections 1097, 1098, 1103, 1108, and 1109, but the section which imposed the penalty, section 1112, was not amended. The word "pint" remaining in section 1112, which imposed the penalty, it was only for selling in a quantity less than one pint that any punishment could be inflicted. It follows, therefore, that an indictment which charged selling in quantities less than *one gallon* charged no offense which could be punished under the law. At the time the offense is charged to have been committed in this case it was not unlawful to sell in quantities greater than one pint, the privilege tax having been repealed by Acts 1882. The law against retailing only extended to sales less than one pint, which left no statute against selling in quantities greater than one pint. The Legislature, in 1884, remedied this by amending section 1112, as the other sections of the Code had been by Acts 1882. See Acts 1884, page 18. This occurred, however, after the sale in this case, which was in June or July, 1883.

We can take the other position, that retailing liquors in any quantity was not punishable at all from the passage of the Acts of 1882 up to the further amendment in 1884, which gave effect to the Act of 1882. We cannot see any escape from a reversal of this case, and a discharge of the appellant, as it is well settled that the penalty is inseparable from the law itself. Bishop on Statutory Crimes, § 21.

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It is said in the above section by Mr. Bishop that a law without a penalty is no law at all. * * *

No brief for the State is found in the record.

OPINION.— CAMPBELL, C. J., delivered the opinion of the court:

The indictment charges no offense. It alleges a sale of spirituous liquors on the 7th of September, 1883, in a quantity less than one gallon, without a license, in pursuance of law.

From February 23, 1882, to March 4, 1884, there was no penal law against selling spirituous liquors without license in less quantity than one gallon. It was a penal offense to sell less than one pint, but not to sell less than a gallon, as this indictment charges. This state of the law resulted from the action of the Legislature in enacting that the word "pint," in sections 1097, 1098, 1103, 1108, and 1109 of the Code should be stricken out and the word "gallon" inserted. Acts of 1882, page 10. The word "pint" was not stricken out of section 1112 of the Code until March 4, 1884. That section, and that only, denounced a penalty against selling without a license in particular quantity and its penalty was for selling less than a pint.

No objection of this sort was made in the trial of this case in the Circuit Court, but since it is manifest that the indictment does not charge an offense, the judgment for a penalty not provided for by any law cannot be enforced.

We arrest the judgment and discharge the appellant.

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GATTMAN & Co. *v.* ACKER.

Agency.

A purchaser of four bales of cotton in his own name, though payment be made therefor with money borrowed of a bank, is not an agent of the bank.[1]

Pledge.

There must be a delivery of an article to constitute a pledge of same.

In September, 1884, F. G. Henley purchased of John T. Franklin four bales of cotton, giving him a check therefor, drawn on Gattman & Co., bankers, of Aberdeen, Miss. Henley went to the bank and asked them to pay the check and he would let them hold the cotton as security, but the warehouse receipts were not delivered up until some days later. J. M. Acker, appellee, held a judgment against F. G. Henley for $182.16, rendered June 4, 1884, and on the date of Henley's purchase of the cotton from Franklin an execution was levied on the same as the property of F. G. Henley. Gattman & Co. promptly filed a claimant's issue and replevied the cotton, giving bond therefor. On the trial of the cause in the court below, judgment was rendered for plaintiff in the sum of $211.50, the value of the cotton. From this judgment claimant appeals.

APPEALED from Circuit Court, Monroe county, J. W. BUCHANAN, Judge.

Affirmed, January 19, 1885.

1

The statute referred to in this case is in the following words: "If a person shall transact business as a trader, or otherwise, with the addition of the words 'agent,' 'factor' 'and company' or 'and Co.' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action, used or acquired in such business, shall, as to creditors of any such person be liable for his debts, and be, in all respects, treated in favor of his creditors, as his property." Code 1880, § 1300; Code 1892, § 4234.

Both possession and good faith of the parties are essential to a valid pledge. First National Bank *v.* Caperton, 74 Miss. 857, 22 So. 60; Caperton *v.* McCormick, Id.

A pledgor of a note retains an equitable interest therein. Baker *v.* Burkett, 75 Miss. 89, 21 So. 970.

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Attorneys for appellants, Houston & Reynolds.

Attorneys for appellee, Sykes & Bristow.

Brief of Houston & Reynolds:

There was no sign of "factor," "agent," "company," or "Co." The business was transacted by Henley in his own name without any such addition. The statute, section 1300 of Code, in such cases, makes all the property "used or acquired" in the business liable for all the debts of the party conducting the business. * * *

The property must be "used or acquired" in the business before it becomes liable. It must be such use or acquisition as gives the party credit on the faith of the ostensible ownership. The statute was never intended to apply to the purchase of property with the money of another and for that other, and when the property was not so used or acquired, as to mislead others or induce credit.

The statute does not apply to property placed in the hands of an agent to be sold for the owner and the proceeds to be at once handed over to him. The property in such a case is not so "used or acquired" as to make it liable. Shannon *v.* Blum & Co., 60 Miss. 828.

The same reason leads to the conclusion that the statute does not apply where money is placed in the hands of an agent to buy property, and the property to be immediately delivered to the principal.

The object of the statute, and it is a wise one when construed according to its purpose and intention, "was to prevent the assertion of secret claims to property as against the creditors of the person who seems to be the owner of it, evidenced by his dealings with it." In the case of a cotton buyer who purchases with the money of another and delivers the cotton over to the owner immediately, there is nothing which evidences an ownership.

Henley had no "sign." There was a cotton sample suspended by a line. It was contended in the Circuit Court that because there was no sign disclosing Gattman & Co. as the principal, that the cotton bought by Henley was liable for his debts.

This court knows — it is a part of the business history of the State with which we are all familiar — that in every town and

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depot in this State there are cotton buyers who are purchasing as agents of eastern, southern, and foreign spinners. At one time a lot of cotton will be purchased for a manufacturer in Lowell; the same day another lot will be purchased for a Manchester spinner, and another lot for the Wesson mills. These purchases are made by one person but for different principals. The theory of appellee is that this agent, in the place where he transacts this business, must disclose by a sign "in letters easy to be read, placed conspicuously in the house where the business is transacted," the name of his principal, or otherwise the property "used or acquired" will be liable for the debts of the agent, or rather that the cotton bought will be so liable. If this is a correct construction of the statute, every cotton buyer purchasing for the account of others must have a sign painter at his command and before he completes a purchase for Baring must have a new sign painted, "easy to be read and conspicuously posted," disclosing that he is now purchasing for Baring. The next lot is to be purchased for Butler, but before he makes it, he must haul down his Baring sign and have a new one painted "easy to be," etc., disclosing a purchase for Butler. How many signs each cotton buyer would have on hand at the close of a season, and how many sign painters he would require to make the needed presto change, there is no estimating. * * *

Take the case of Sholfield *v.* Wilkins, 60 Miss. 238. Wilkins was conducting the business as agent for his wife, salesman and manager. There was no sign. There may have been, doubtless was, hanging in front the usual display as an indication of what was done or sold within. The creditors of Wilkins sought to subject the property to the payment of their debts. This court held that the property is not liable, and in commenting upon the effort of counsel to bring this case under section 1300, say: "This is a total misconception of the statute."

If Wilkins could buy and sell for his wife and the property with which he was dealing would not be liable for his debts, so, if Henley, without any sign, buys cotton for Gattman & Co., the cotton is not liable for Henley's debts. "This is a misconception of the statute to so contend."

There is a dictum in Gumbel *v.* Koon, 58 Miss. 267, which has led to a very erroneous construction by the inferior courts of section 1300. We allude to the concluding sentence of the opinion:

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"And it (the sign) conclusively fixes the ownership to be in the party whose sign is exhibited at the place where the business is conducted, or who, in the absence of any sign, is the manager of the business."

Schoolfield *v.* Wilkins, 60 Miss. 238, limited and explained the language of the court in the concluding clause, and established that where there was no sign, the property was not liable for the debts of the manager who was agent of the owner.

The other clause has been construed to render a stock of merchandise which was owned by A., liable to the debts of B., because B.'s sign was over the door, an old sign which had been there for years. While we do not doubt that these constructions do violence to the language of this court, we call it to its attention, that the language may be modified so as to express the views of the court.

There is nothing in the statute where business is conducted and owned by a different person to make the property used or acquired in the business liable for the debts of a party whose sign is over the door, the sign being in a different name from the real owner. Yet the courts say "that the sign exhibited conclusively fixes the ownership."

This case was decided by the Circuit Court on the last clause of the opinion, that the property is liable for debts of the party who manages the business in the absence of a sign.

We submit these matters for the consideration of this court, and that its language in the case cited may be so modified as to express its conclusions as intended.

Brief of Sykes & Bristow:

To state this case is, in our opinion, to decide it. We cannot conceive of a case coming more strictly within the letter and the spirit of the statute. Compare the facts of this case with the last paragraph of section 1300 of the Code. The court will perceive that the "sign" provision is eliminated from this paragraph, the lawmakers assuming, of course, that if a person "transacts business *in his own name,* it *could* not be that he had any sign out indicating that he was *not* transacting business *in his own name.* The two things are utterly incompatible.

As Henley had *no* sign out at all, except a bunch of cotton hanging before the door of Elkin's drug store, it is unnecessary to in-

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voke the provisions of the first clause of section 1300, relative to disclosing by sign the name of his "principal or partner." He does not *assume* to be doing business as "agent" or "factor" or anything of the sort. He does business "without any such addition." * * *

Henley's business was cotton buying in his own name. The sole question remaining is, was the property here in controversy "acquired in such business?" There is no doubt of it. Rogers recommended Franklin to go to Henley as a regular cotton buyer. Franklin went to him as such, and sold to him the cotton as such, receiving his check on Gattman & Co., bankers, therefor. Henley says Franklin came to him to sell, and offered the cotton at a reasonable price; he thought he could make some money out of the trade, and bought it. To argue that this was an "acquiring" of the cotton in the "usual course of Henley's business" is superfluous. It is too plain for argument.

The cotton then was bought by Henley, and was in his possession (in contemplation of law, he holding the warehouse receipts), when the execution was levied on it. We submit that it was subject to levy and sale as Henley's property.

Leaving out of Gumbel *v.* Koon, 59 Miss. 264, the so-called "dictum" that appellant's counsel speaks of, we submit that the *decision* in that case is conclusive of this case. The two cases are exactly the same, except that in Gumbel *v.* Koon, Buffington was buying for one particular principal, and Henley was buying for himself. (We presume to sell again, as he speaks of being able to make some money out of the trade owing to the low price at which he bought.) This makes this case much stronger than Gumbel *v.* Koon, and one in which the *reason* of the law would apply with much greater force. Where one person is buying cotton for *another particular person exclusively* and shipping to him, it might be supposed that the public would soon find it out without making any sign to that effect, and there would be small danger of any one's being victimized.

But when a party, like Henley, is buying, not for any other, but simply in his own name, and on his own account to speculate on — to allow him to set up — when property acquired in that business is sought to be subjected to his debts, that, though generally buying for himself, in that particular purchase he acted as the secret agent of another, would be to allow him to perpetrate a swindle on creditors.

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Section 1300 of the Code was enacted to prevent just such swindles, and this court in Gumbel *v.* Koon declined to engraft any exceptions on the statute on the ground of its alleged hardship. * * *

If the doctrine of Ketchum *v.* Brennan, 53 Miss. 596, could be applied to the case where A. purchases from B., and agrees with C. that the property is to be C.'s until the money advanced by C. is repaid — then it would be covered by the statute, section 1300, for this is a clear case of a purchase by A. as agent of C., without disclosing his agency — that is, assuming all the time that A. is engaged in the business of such purchases.

* * * It is not true that there are cotton buyers in every town in the State purchasing as agents of eastern, southern, and foreign spinners. We doubt whether there is one in the South. The court seemed to doubt it in Gumbel *v.* Koon. Eastern, southern, and foreign spinners do not keep agents in the cotton belt buying for them on commission or on salary. It would not pay. Cotton buyers in our country carry on a regular business; they buy to sell again at a profit. * * *

But even if the cotton buyer were acting as the agent of certain specified spinners, we see no difficulty in applying the statute He can readily disclose by a sign for whom he is buying. But counsel supposes the case of a buyer who holds himself out to buy for *anybody* on commission or otherwise, and asks how he is to disclose by sign the parties for whom and with whose money he buys each bale of cotton. We reply that in that case he would be a *factor*. Story on Agency, § 33, note 2.

And this court has held that the statute does not apply to *factors*. Shannon *v.* Bluhm, 60 Miss. 831. * * *

In Schoolfield *v.* Wilkins, 60 Miss. 238, the wife "was doing business as a merchant *with her own means and in her own name*" without any sign at all, and we have always wondered at the attempt in that case to apply the statute of section 1300. That it did not apply in such a case is too clear for argument. If Gattman & Co. in this case had been carrying on the business of cotton buying with their own means and in their own name, and Henley, like Wilkins, had been acting as their *clerk* or *agent*, clearly the cotton acquired by Henley for them would not be liable for his debts. But there is no pretense here that Henley was not carrying on the business in his own name, or that Gattman had

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anything to do with the business except to advance the money to the buyer on good security. * * *

OPINION.—COOPER, J., delivered the opinion of the court:

The facts in this record do not disclose a case of purchase by Henley as the agent of Gattman & Co. The purchase was by Henley for himself, the money paid was for his account, and he was and is liable to pay the same as a debt to Gattman & Co.

The evidence shows only an unexecuted agreement that Gattman & Co. should have a pledge of the cotton to secure the payment of the money advanced. There was no delivery of the cotton, and, therefore, no pledge.

The judgment is *affirmed.*

DOLPH PATTON et al. *v.* STATE OF MISSISSIPPI.

Cohabitation — Evidence.

Evidence showing an inference of habitual concubinage is sufficient to justify a verdict of guilty under an indictment charging unlawful cohabitation.[1]

The indictment upon which defendant was convicted was in the following words: "In the Circuit Court of Rankin county, February, 1884, term. The grand jurors for the State of Mississippi, upon their oaths, present that Dolph Patton, a man, and Fanny Pool, *alias* Winningham, a woman, on the 1st day of Oc-

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Adultery and fornication at common law were indictable only when committed openly and publicly. Carotti's case, 42 Miss. 334.

In order to constitute the offense denounced by art. 8, p. 573, Rev. Code 1857, it must be shown that the parties dwell together openly and notoriously as if the conjugal relation existed between them. The language of the act is this: "If any man and woman shall live together in unlawful cohabitation, whether the same be in adultery or fornication, they shall be punished," etc. Carotti's case, 42 Miss. 334.

Criminal intercourse once shown is presumed to continue if the parties are still living together under the same roof, although those who dwell with them are not prepared to depose to the fact. Carotti's case, 42 Miss. 334.

C. and W. were indicted for unlawful cohabitation. The testimony showed that W. as a servant woman was in the employ of C. as keeper of a hotel

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tober, 1883, in Rankin county, State of Mississippi, and therein afterward until the finding of this bill of indictment, did unlawfully cohabit together, each having then and there habitual sexual intercourse with the other, they not being then and there lawfully married to each other. Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi." The opinion of the court states all the material facts.

APPEALED from Circuit Court, Rankin county, A. G. MAYERS, Judge.

Affirmed, February 16, 1885.

Attorneys for appellants, H. R. Ware, and Cole White & E. Jack.

Brief for the State not found in the record.

Brief of H. R. Ware:

* * * Manifestly the jury were led astray by illegal instructions, and instructions calculated to confuse and mislead them. The first instruction for the State comes clearly under the first, that is manifestly if it is not the law. The court instructs that "cohabitation may be proven by circumstances which show habitual intercourse." Such is not the definition of cohabitation as given in Carotti *v.* State, 42 Miss. 334; Kennard *v.* State, 57 Miss. 132, and Granberry *v.* State, 61 Miss. 442.

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and railroad eating-house, and that C. had been caught on several occasions in the act of sexual intercourse with W., and several times in bed with her. *Held*, that under the statute the testimony was not sufficient to warrant a conviction. Carotti's case, 42 Miss. 334.

While clandestine acts of sexual intercourse, no matter how often repeated, do not constitute unlawful cohabitation, if the parties openly and notoriously live together as paramour and concubine, exercising toward each other the rights and privileges which belong to marriage, the offense is complete. It is not necessary that the parties shall hold each other out to the world as married. Carotti *v.* State, 42 Miss. 334, explained; Kinard *v.* State, 57 Miss. 132.

Section 2700, Code of 1880, provides that: "If any man and woman shall unlawfully cohabit whether in adultery or fornication, they shall be fined * * * and it shall not be necessary, to constitute the offense, that the

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In the latter case the court expressly says "that clandestine acts of sexual intercourse, no matter how often repeated, do not constitute unlawful cohabitation unless the parties openly and notoriously live together," etc. The instruction tells the jury the offense is complete when habitual intercourse is proven, but in words in the Granberry case the court says not so, unless it was open and notorious. Manifestly the record shows no open and notorious living together between the defendants, and manifestly if the instruction had been given in accordance with the Supreme Court definition of this crime, it is unreasonable to suppose, with the facts before them, that the jury would have found as they did.

The fourth instruction for the State, while its illegality is not so patent, was certainly well calculated to confuse and mislead the jury and fill their minds with the idea that it was an argument of the court substantially directing a verdict of guilty; otherwise it were wholly superfluous as it was extraordinary for the court to invite the attention of the jury to the animal instincts and propensities existing between man and woman, and virtually to say to the jury that, knowing these facts, you must find that if the evidence is that an opportunity was offered you must find that they indulged in these passions and are guilty.

Again in the same instruction the court directs the jury that they must regard the *proven relations existing between the parties.* Substantially, if not in words, the court here says to the jury that some improper relations have been proven as existing between the defendants. The instructions were not only erroneous, but the court must see that they misled the jury in a way that caused an improper verdict.

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parties dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse." It is not essential to guilt under this statute that the parties shall dwell together, nor that they publicly avow the relationship which exists between them; it is sufficient to show that condition or relationship, whether avowed or concealed, which, if publicly known, would lead men to characterize the woman as the mistress of the man. It is habitual concubinage, or lying together, that constitutes the offense. Granberry *v.* State, 61 Miss. 440.

An indictment is not good as an indictment for unlawful cohabitation under section 2700, Code 1880, if it is not averred that the parties were guilty of habitual sexual intercourse. Granberry *v.* State, 61 Miss. 440; Newman *v.* State, 69 Miss. 393, 13 So. 831.

Where cohabitation, using the word in its ordinary signification, is shown, one or more acts of sexual intercourse clearly proved directly or by circum-

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Brief of Cole White & E. Jack:

The evidence was not sufficient to warrant the verdict rendered in this case. Judge Cooper, in Granberry *v.* State, 61 Miss. 440, defines "cohabitation" to be "habitual concubinage or lying together," and further says, "where a cohabitation is *shown,* one or more acts of sexual intercourse clearly proved, or circumstances from which the fact of such intercourse would necessarily be inferred, as that the parties slept in the same bed, would uphold a verdict of guilty."

Now we contend that no such "cohabitation" was shown in this case. * * *

The court erred in giving the first instruction asked for the State. The instruction virtually calls upon the jury to find the defendants guilty. In the first place they are told that in judging of the "guilt" (not *guilt or innocence*) of accused, the jury would naturally infer from this that the court thought the parties guilty. * * *

OPINION.— COOPER, J., delivered the opinion of the court:

The appellant, Patton, was engaged in carrying the mails from Brandon to Westville. Much of the time he was on the road, but he had his cooking and washing done at a house rented by him, and the appellant, Winningham, was his servant. So often as he remained at his house over night he occupied the same room with Winningham, and on one occasion they were discovered lying together.

stances will uphold a conviction. In the absence of such evidence of cohabitation, proof of occasional acts of sexual intercourse is not sufficient; they must be repeated so often as to become habitual. Granberry *v.* State, 61 Miss. 440.

Where, on a trial for unlawful cohabitation, there is evidence, though contradicted, that defendants, a white man and a colored woman, were seen in bed together within two years, that for five years they had lived near to each other, that he was frequently seen at her house and in her bed; that he was at her house often, especially on Sunday; that she had two mulatto children whom he had been heard to call his children, a conviction will not be disturbed. Stewart *v.* State, 64 Miss. 626, 2 So. 73.

A teacher who during a short period of time commits a few acts of sexual intercourse with a pupil openly in the schoolroom is not guilty of cohabitation with her. Brown *v.* State, 8 So. 257.

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On this testimony the jury was warranted in finding them guilty of unlawful cohabitation under our statute. Enough had been shown to justify the inference of habitual concubinage, and this, under the statute, is unlawful cohabitation. Granberry *v.* State, 61 Miss. 440.

Affirmed.

MRS. E. CATO *v.* JOHN T. HARDIN & CO.

Statute of Frauds.

A. buys horses and mules for B. and C., but has the stock shipped in his own name, and places same in a stable at destination, without disclosing his agency, but treating them as his individual property, and offering them for sale in his own name. *Held*, that such transaction is within the Statute of Frauds and property is subject to levy in favor of his creditors.[1]

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The statute involved in this decision is in the following words: "If a person shall transact business as a trader, or otherwise with the addition of the words, 'agent,' 'factor,' 'and company' or 'and Co.,' or like words, and fail to disclose the name of his principal or partner, by a sign in letters easy to be read, placed conspicuously at the house where such business in transacted, or if any person shall transact business in his own name, without any such addition, all the property, stock, money, and choses in action, used or acquired in such business, shall, as to the creditors of any such person, be liable for his debts, and be, in all respects, treated in favor of his creditors as his property." Code 1880, § 1300; Code 1892, § 4234.

Creditors, whether antecedent or subsequent, and with or without notice of the undisclosed principal, can avail themselves of the section. Gumbel *v.* Koon, 59 Miss. 264; Quin *v.* Myles, 59 Miss. 375.

Where property is placed in the custody of a trader, to be sold by him as part of his stock, under such circumstances as make them appear to be his, and thus furnish him a basis of credit, they become liable for his debts. Shannon *v.* Blum, 60 Miss. 828.

The effect of the statute is to make all the property, stock, money, and choses in action used or acquired "in the business" the property of the person who transacts such business, and liable for his debts, without regard to the sign under which the business is conducted, unless by a proper sign the name of the owner of, or partner in, the business is disclosed. Loeb *v.* Morton, 63 Miss. 280; Paine *v.* Hall, 64 Miss. 175, 1 So. 56.

The section does not apply to a person engaged in a business of buying rough lumber, planing it for building purposes, and reselling it. Willis *v.* Memphis Grocery Co., 19 So. 101.

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The facts in this case are stated in the opinion of the court.

APPEALED from Circuit Court, Copiah county, T. J. WHARTON, Judge.

Affirmed, February 23, 1885.

Attorneys for appellant, W. P. & J. B. Harris, and Harris & Dodds.

Attorneys for appellee, Willing & Sexton.

Brief of W. P. & J. B. Harris, and Harris & Dodds:

To bring a case under the operation of section 1300 of the Code of 1880, one of two states of case must be made to appear; first, that the party was transacting business as a trader or other-

The mere permissive possession of property of another by a trader, where he neither "acquired" an interest in, nor a right to "use" such property in his business, is not sufficient to bring it within the statute. Hall's Gin Co. *v.* Berg, 65 Miss. 184, 3 So. 372.

Where wagons are placed in the custody of a merchant and kept in a lot adjoining his store, to be sold as a part of his stock, they are subject to his debts, though sold on commission for a manufacturer who reserves a legal title as security for the price. Bank *v.* Studebaker, 71 Miss. 544, 14 So. 733.

Unless the property be "used or acquired" in the business with the consent of the real owner, it does not become liable under the section. Adams *v.* Berg, 67 Miss. 234, 7 So. 225.

Although the wife owns the personal property used in carrying on a general livery-stable business, and the lease of the building and privilege license are in her name, and the books are kept and accounts made out in her name, yet if the husband conducts the business, and is usually at the stable superintending it, and is shown to have given orders for the payment of dues to the stable, signing his name thereto, and the only advertisement in the local newspaper is of "Carr's Stable," the husband being mentioned in the advertisement as manager, and he speaks of the business as his, and apparently acts as proprietor, though some persons are aware that the wife is such, the property used in the business is liable for the debts of the husband. Hamblett *v.* Steen, 65 Miss. 474, 4 So. 431.

The statue does not apply to a person conducting the business of milling and ginning for the public, but applies only where the business transacted is that of a trader, or one *ejusdem generis*. Yale *v.* Taylor Mfg. Co., 63 Miss. 598.

This section does not apply to property neither used nor acquired in the trader's business. Longino *v.* Bank, 76 Miss. 395, 24 So. 901.

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wise with the addition of the words "agent," "factor," "and company," or "and Co.," or like words, without the sign prescribed by the statute; second, or that he was transacting business in his own name. The attempt is to bring this case under the second head, but is fatally defective in this; there was a total failure to show that L. N. Cato was transacting business in his own name, unless the fact that he shipped the mules to Hazlehurst in his own name makes him a party transacting business in his own name within the meaning of the statute. * * *

In Gumbel *v.* Koon, 59 Miss. 264, the party was *actually* doing business and advertising in his own name. In Quin *v.* Myles, 59 Miss. 375, the party had taken out license and was managing and controlling the business in his own name, the license being to Henry Bazinsky & Co.

The apparent ownership which the court alludes to in Gumbel *v.* Koon is more than *mere naked possession,* but must be accompanied with such acts of control as would lead the outside world and parties dealing with him to suppose that the party was the owner.

In Shannon *v.* Bloom & Co., 60 Miss. 828, Shannon & Co. were engaged in business dealing in mules and horses as a regular business, "and there was evidence to warrant the belief that the property then involved was intentionally so placed by the owners in their custody, as to become a part of their stock, or by appearing to be so, to furnish them with a basis of credit." There is no such state of facts in the case at bar. No case so far decided by this court affords authority for the proceeding here. The record shows that the objective point for the mules was Union Church in Jefferson county; that was the place of business, if any. Suppose then there had been a sign at Union Church, such as the statute requires. A sign in the language of the one put up at the livery-stable after the levy (and, so far as the record shows, there may have been such a sign), would the court say this levy could be sustained. * * *

We respectfully submit that the case must be reversed:

First. Because, upon a view of the whole case, it is not one to which the statute applies.

Second. The instructions given for the plaintiff are grossly misleading and are not responsive to the proof.

Third. The court was manifestly wrong in refusing instructions asked by the claimant.

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Brief of Willing & Sexton:

* * * The decision of this case involves the construction of section 1300 of the Code of 1880. This court has already construed that section of the Code in four cases which are reported; and it might be supposed that the principles therein announced were broad enough to cover any case that might arise. The statute has two clauses. The first relates to a person transacting business as a trader or otherwise, with the addition of the words "agent," "factor," "and company," or "and Co.," or like words, and who fails to disclose the name of his principal or partner by a sign placed at the house where the business is transacted.

The second relates to a person who transacts business in his own name without such addition, with or without a sign, and, according to our view, with or without a house or anything like a permanent place of business, traveling through the country and stopping over for a few days at a time at any one place. This case falls under the latter clause of the statute. * * *

Harris had rented stalls at Groome's stable. They then had a house or place of business, and no sign was exhibited, showing the true ownership, until after the levy, when a sign was placed over the stable showing that N. L. Cato was acting as agent of claimants. The mules were then kept in Groome's stable till they were sold, the claimant having bonded them.

Under this statute, as construed in the cases of Gumbel *v.* Koon, 59 Miss. 264; Quin *v.* Myles, Id.; Schoolfield, Hannah & Co. *v.* Wilkins Co., 60 Miss. 241, and Shannon *v.* Bloom & Co., 60 Miss. 831, these mules were liable to be seized as the property of N. L. Cato. It is insisted that N. L. Cato had "transacted no business," within the meaning of the statute, prior to the levy, as he had made no sales nor offered to sell. He certainly was engaged in business as a trustee or vendor of the mules at the time. He had transacted the business of buying and bringing them to the place where he expected to sell them, and had there exposed them for sale. * * *

According to the testimony Cato was the manager of this business, and by his dealings with the property levied on was the apparent owner of the property levied on, which was part of his stock of mules, both "acquired" and "used" in that business. That brings the case clearly within the rule laid down in Gumbel *v.* Koon. Has that case been modified in Schoolfield, Hannah &

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Co. *v.* Wilkins? We think not. That case was decided on the agreed state of facts, which were that Mrs. Wilkins was doing business in her own name, with her husband as clerk. He was neither the "apparent owner" nor the manager of the business. Yet the court says in that case, that "the whole object of the statute is to force a disclosure of the ownership by treating as owner him who so appears." The facts in this case are similar to those in Shannon *v.* Bloom & Co., and, as we think, bring the case more clearly within section 1300. It was contended there with some plausibility that the horses levied on and claimed by Mrs. Shannon had not been acquired nor used by Shannon & Beck in their business and had not become a part of their stock, but that they were merely placed in their hands to be sold and the proceeds immediately handed over to Mrs. Shannon. The court says in that case that while the statute might not apply to a factor or auctioneer in whose hands property has been placed to be sold and the proceeds immediately turned over, yet "where property is intentionally placed by the owner in the custody of a trader, as either to become a part of his stock, or by appearing so, as to furnish him with the basis of credit," the statute applies. * * *

OPINION.— ARNOLD, J., delivered the opinion of the court:

L. N. Cato went to St. Louis as the agent of his wife, Mrs. E. Cato, and Captain L. B. Harris, and bought a carload of mules and horses and shipped them to Hazlehurst, Miss. The stock was consigned to L. N. Cato. They arrived at Hazlehurst on the night of the 8th of February, 1884, and were placed in a livery-stable, where they were levied on the next evening as the property of L. N. Cato, under an execution issued on a judgment in favor of John T. Hardin & Co., against L. N. Cato. Before Cato left for St. Louis he and Captain Harris made arrangements with the keeper of a livery-stable in Hazlehurst for keeping the stock by the day when they should arrive, and Harris told the livery-stable-keeper that he had an interest in the stock but did not wish it to be known. The interest of Mrs. Cato in the stock was not made known until after they were levied on. After the horses and mules were put in the livery-stable, and before the levy, L. N. Cato was exhibiting and offering to sell them. It appears that the stoppage of the stock in Hazlehurst was temporary, and that L. N. Cato was to take them to his home in Jefferson county and

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there sell them. Until after the levy there was no sign put up at the livery-stable in which the stock was placed, as required by section 1300 of the Code, which provides that: "If any person shall transact business as a trader or otherwise with the addition of the words 'agent,' 'factor,' and 'company,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business, shall, as to the creditors of any such person, be liable for his debts, and be, in all respects treated in favor of his creditors as his property."

After the levy Mrs. Cato and Captain Harris claimed the stock, and the claimants' issue having been determined against them in the Circuit Court, Mrs. Cato appealed.

Without considering separately the various errors assigned here, we are satisfied from the evidence that the transaction was within the Statute of Frauds above quoted, and that a proper result was reached in the case in the lower court.

Affirmed.

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MULVAHILL & BAKER *v.* B. COHEN.

Attachment — Excessive Damages.

An attachment was sued out on an account of $113.23, and on dismissal of same, damages were assessed at $150. *Held*, that the damages were excessive.[1]

B. Cohen was operating a general store in Woodville, Miss., in July, 1882, and purchased of appellants a bill of goods upon which there was due $113.23. On the 21st of said month, Mulvahill & Baker, plaintiffs below, sued out an attachment on said account of $113.23, and levied on goods of defendant amounting to $360 in the aggregate. The affidavit upon which this attachment was issued was, in the main, in the following words: "Personally appeared C. P. Neilson, agent and attorney for Mulvahill & Baker, and made oath that B. Cohen is justly indebted to the said Mulvahill & Baker in the sum of $114, or thereabouts, and

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On sustaining a plea in abatement the measure of damages is the same as in a suit on the attachment bond. In estimating "actual damages" the jury may consider expenses and loss incurred in making defense to the attachment, and loss occasioned by being deprived of the use of the property pending the attachment by an illegal sale of it, or by injury thereto, or loss or destruction thereof. Marqueze *v.* Southeimer, 59 Miss. 430.

In the absence of malice or oppression on the part of plaintiff, the damages for a wrongful attachment should be limited to those actually sustained. Myers *v.* Farrell, 47 Miss. 281.

Although loss of trade and special injury to business may be considered in estimating defendant's damages for wrongful attachment, these do not include contingent and uncertain profits which defendant might make. Damages in the case at bar held to be speculative and excessive, necessitating a reversal. Myers *v.* Farrell, 47 Miss. 281.

Actual damages are recoverable on an attachment bond when a breach occurs; and counsel fees are embraced. Marqueze *v.* Southeimer, 59 Miss. 430; Buckley *v.* Van Diver, 70 Miss. 622, 12 So. 905.

Attorneys' fees can be allowed only for defending the attachment issue exclusive of the counter demand for damages; and fees are to be allowed for one firm only, unless the jury shall be satisfied by the evidence that the necessities of the case required more than one. Roach *v.* Brannon, 57 Miss. 490.

Under section 1462, Code 1871, damages for the wrongful issuance of an attachment must be compensatory, and the enumerated elements of damages, lawyers' fees, traveling expenses, hotel bills, loss of trade, and special injury to business are exclusive of all others. Roach *v.* Brannon, 57 Miss. 490.

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that said B. Cohen has disposed of, or is about to dispose of, her property or rights in action or some part thereof with the intent to defraud her creditors, and that she fraudulently contracted said debt."

Bond was entered into in the sum of $230 that "we, C. P. Neilson, agent and attorney for Mulvahill & Baker, are firmly bound," etc. This bond is signed, "Mulvahill & Baker, by C. P. Neilson, Atty. & Agt. C. Shaefer." A sworn statement of account against B. Cohen was filed, showing a balance of $113.23. A motion was made at the trial of the cause before the justice of the peace to quash the attachment, denying the allegations in the affidavit, and (1) because the bond was not in double the amount of the debt; (2) there was no surety named in the bond; (3) the affidavit is not for the amount shown by the sworn statement and that the levy was excessive. Which motion was sustained.

On appeal to the Circuit Court, a motion to quash the attachment was overruled, and a plea in abatement was filed, denying all allegations in the attachment affidavit. The evidence showed that appellants and others had been running accounts with B. Cohen since the early part of the year 1881. Also that on April 13, 1882, a judgment was obtained by J. Frieson & Co. against defendant for $642.12, and that on May 16, 1882, the goods, wares, and merchandise of B. Cohen was sold for $490 and bought in by the judgment creditor, who took charge of the store and employed the father of defendant to operate same. A judgment was rendered in favor of defendant dismissing the attachment and assessing the damages at $150. From which plaintiffs appeal.

APPEALED from Circuit Court, Wilkinson county, J. B. CHRISMAN, Judge.

Reversed and remanded, February 23, 1885.

Attorney for appellant, C. P. Neilson.

Attorney for appellee, D. C. Bramlett.

Brief of C. P. Neilson:

This is a suit by attachment, filed in April, 1882. The case was tried in April, 1884. The verdict of the jury was that the attachment was wrongfully sued and assessed the damages at

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$150. On motion for new trial, defendant entered a remittur to the amount of $50. The court applied the Act of 1884 and rendered judgment that "the suit abate." This was clearly erroneous. In the case of Powers *v.* Wright, decided at this term, Opinion Book L, page 391, the court says the Act of 1884, amendatory of the Attachment Law, is prospective in its effect and cannot be applied to suits pending at its passage. This is the fifth and last assignment of error, and we think alone secured a reversal. We insist that the verdict should be set aside. The testimony of Cohen, taken altogether, sustains the attachment. The damages, even at $100, are excessive. The store was closed by the attachment of Picard & Weil; on the 10th of April, 1882, the goods were seized under Freehan's execution, and on the 16th sold for $490.

Cohen testified that the "goods deteriorated in value $200 from moldy and rotting potatoes, fruit," etc. The inventory shows less than $20 worth of potatoes and fruits, and the schedules and sheriff's return shows a sale for $130 in excess of the value at the time of the levy.

Brief of D. C. Bramlett:

The judgment of the court below that the suit abates upon the failure of appellants to sustain their attachment was in accordance with law. That under the Code of 1880, appellants only, and by virtue of the law there contained, had the right to proceed with their case and obtain judgment upon failing to establish his attachment, and this provision of the Code was repealed by Act of 1884. The case of Powers *v.* Wright, cited by counsel, holds that the Act of 1884 is not prospective as to vindictive damages, but as to the remedial portion of this law it is prospective, and sustains the action of the court below.

The damages allowed appellee by the jury were actual damages only, and the amount, deducting the *remittitur* entered by appellee, was fully warranted by the testimony of J. Cohen and Sheriff Miller.

Appellants were not entitled to their attachment for the female witness, appellee. The attendance of a female witness cannot be compelled, except after deposition taken upon affidavit that the personal attendance of such witness in open court is necessary for the ends of justice. Code of 1880, § 1608.

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OPINION.— CAMPBELL, C. J., delivered the opinion of the court:

The attachment was wrongfully sued out, but the damages adjudged therefor were excessive.

The Act of 1884, amendatory of the Attachment Law, had no application to this attachment, which was pending when it was passed. Powers v. Wright, Ms. Opin.

Reversed and remanded for a new trial.

E. H. STRONG, Sr., et al. *v.* JOHN PARET.

Fraudulent Conveyance — Sufficiency of Proof.

A voluntary conveyance by a debtor to a son is *prima facie* fraudulent, and it would devolve upon the grantee to show it was not, by proof of ample visible property reserved by debtor for the payment of his debts.[1]

Charge on Property — What Constitutes.

To constitute a charge upon the lands of a debtor, the bill must show conclusively that he did *not* retain sufficient property above the amount of his debts to liquidate same.

This was a suit in the Chancery Court of Clay county in which a conveyance for exchange of property between father and son is sought to be set aside, and was predicated on a judgment, rendered September 20, 1882, for $411, in favor of appellee (as

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A voluntary conveyance is *prima facie* fraudulent as to existing creditors, and the party claiming under it must rebut this presumption by clear and satisfactory proof. It will not be sufficient to show merely the fair intention of the grantor, and that by good management the property retained by him was sufficient to pay his debts. The proof must show that by the ordinary course of human transactions the conveyance could not operate to delay, hinder, or defeat the claim of the prior creditor. The property conveyed must be so inconsiderable when compared with that retained by the grantor, and the debts owed by him, that it could not be supposed that the gift endangered the safety of any of his debts, or could delay their payment. Young *v.* White, 3 Cush. 146; Swayze *v.* McCrossin, 13 S. & M. 317.

A voluntary conveyance by an insolvent debtor is fraudulent *per se* as to existing creditors, whether made with a fraudulent intent or not, and in such a case it is not necessary in the bill to aver the fraudulent intent. Catchings *v.* Manlove, 39 Miss. 655.

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assignee, on a promissory note signed and executed May 6, 1881, by E. H. Strong and wife, appellants. The prayer of the bill is to make this judgment a charge upon certain lands conveyed by one Peter Stark, agent, to E. H. Strong, Jr., son of E. H. Strong, in exchange for certain lands then owned by appellants. The bill alleges briefly that appellants were the owners of a large and valuable plantation which was exchanged for property worth materially less; that the exchange was only a partial consideration; that said plantation was all the property the appellants had at that time or have had since. To which appellants demurred on the grounds that the bill did not charge insolvency at the time of the conveyance, or that the conveyance was for the purpose of defrauding creditors, or that thereby appellee was hindered and delayed in the collection of his debt. This demurrer was overruled, and from the decree of the chancellor, appellants appeal.

APPEALED from Chancery Court, Clay county, S. EVANS, Chancellor.

Reversed, demurrer sustained, and bill dismissed, January 18, 1886.

Attorneys for appellant, White & Fox.

Attorneys for appellee, Barry & Beckett.

Brief of White & Fox:

* * * In the case of Hogan *v.* Bennett, 37 Miss. 617, it was held that an allegation in a creditor's bill to set aside a

There was a conveyance by the debtor to his brother-in-law, who afterward conveyed to the debtor's wife. The court reviewed the evidence and came to the conclusion that the conveyances were voluntary, and mere contrivances to defeat creditors. Henry *v.* Fullerton, 13 S. & M. 631.

A voluntary conveyance is not fraudulent *per se* as to creditors. Whether it is fraudulent depends upon the financial condition of the grantor, his ability to pay debts out of remaining property, and like circumstances. If he is wealthy, and owes debts only to a trifling amount, a voluntary conveyance made by him will not be deemed fraudulent. (Bogard *v.* Gardley, 4 S. & M. 302; Swayze *v.* McCrossin, 13 S. & M. 317, disapproved.) Wilson *v.* Kohlheim, 46 Miss. 346.

A voluntary conveyance is *prima facie* void as to existing creditors; the grantor's mere indebtedness, however, will not in all cases render such a conveyance void. The presumption of invalidity may be rebutted by evidence showing that he was in prosperous circumstances, unembarrassed, and had

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fraudulent conveyance, that the conveyance, void on its face and *fraudulent* as to creditors, was insufficient; that there should be an allegation that the conveyances were made with the intent to delay, hinder, or defraud creditors. Yet it appears from the statement of the case in the report of this case, that the trust deed which authorized the trustee to make the conveyance sought to be vacated, "hindered, delayed, and defrauded the complainants in the collection of their debts."

In the case of Catchings *v.* Marlow, 39 Miss. 666, it is held that an allegation of fraudulent intent is not necessary when the bill shows that the conveyance was voluntary and the grantor insolvent, but it seems, from the opinion of the court in this case, it is necessary to allege either a fraudulent intent on the part of the grantor or that the conveyance was voluntary and the grantor insolvent.

In the case of Wilson *v.* Kohlheim, 46 Miss. 360, it is decided that a voluntary conveyance of property by a father to his son is not fraudulent and void *per se* as to existing creditors. * * *

A bill to set aside a fraudulent conveyance which alleges that the conveyance was voluntary and made with the intent to hinder, delay, and cheat creditors, is not sufficient, without alleging that the debtor was insolvent. Wedekind *v.* Parsons, 64 Ind. 290.

A conveyance which is voluntary cannot be impeached for fraud by creditors if the debtor retain ample property to satisfy and the burden of proof is on the creditor. Hogan *v.* Robinson, 94 Ind. 138.

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property left amply sufficient to pay all his debts. Cowan *v.* Alsop, 51 Miss. 158.

A voluntary conveyance for the confessed purpose of preventing the grantor from subjecting the land conveyed cannot be upheld by showing that he had other property not conveyed sufficient to pay all his debts. Edmunds *v.* Mister, 58 Miss. 765.

The legal presumption that a voluntary conveyance of land is fraudulent as to creditors is not rebutted by showing a retention of a reversion of the land in the grantor, where all his tangible property is nominally conveyed for the life of the grantee, but the grantor remains in possession and enjoyment of the same; nor by showing the retention by the debtor of other property unless it is undoubtedly sufficient to readily pay all of his debts and is plainly accessible to the creditors. (Wilson *v.* Kohlheim, 46 Miss. 351, distinguished.) Edmunds *v.* Mister, 58 Miss. 765.

Where a voluntary conveyance is made by a mother to her son, the fact that she was not actuated by any fraudulent intent, and did not even sup-

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The bill should aver the insolvency of the debtor or a fraudulent intent. Braker *v.* Kelsey, 72 Ind. 52; Pfeifer *v.* Snyder, 72 Ind. 78.

We invite the special attention of the court to the case of Wilson *v.* Kohlheim, 46 Miss. 365, and the authorities cited. This case is a review of all the leading authorities and overrules the cases of Bogard *v.* Gardling, 4 S. & M. 310, and Swayze *v.* McCronin, 13 S. & M. —, which held that a voluntary conveyance as to existing creditors was void *per se,* and the general rule now seems to be that the debtor must be insolvent or the conveyance must, in some way, impair, hinder, or delay his creditors, or it must be made with the intent to do so.

The allegations of the complainant's bill not only fail to show that E. H. Strong, Sr., was insolvent at the time of the conveyance to E. H. Strong, Jr., but shows the contrary. There is no averment of any indebtedness except the small debt due John Paret, and the bill shows that the plantation conveyed by E. H. Strong, Sr., was worth much more than the town property conveyed as a part consideration for the plantation, and that E. H. Strong, Sr., received the difference, or at least it does not show that the difference was placed beyond the reach of creditors.

It would be no hardship to require complainants to allege that the conveyance to E. H. Strong, Jr., in fact hindered and delayed existing creditors or that it was made with such intent or that Strong was insolvent at the time of the conveyance.

We invoke the rule that the pleadings are to be construed most strongly against the pleader and the presumption is to be indulged

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pose that she was liable for complainant's debt, is not of itself a defense to a bill to set aside the conveyance. The law presumes that a voluntary conveyance, though resting on proper moral motives, is void as to creditors. Facts may be shown to overcome the presumption of fraud, as that the donor was prosperous, and retained ample means accessible to creditors, to discharge all obligations, and that the gift was reasonable, apparently, in no serious degree putting in hazard the rights of existing creditors; where such are not shown the conveyance will be set aside. Cock *v.* Oakley, 50 Miss. 628.

One is conclusively presumed to have intended fraud if it necessarily and logically results from his conduct. Hilliard *v.* Cagle, 46 Miss. 309.

The intent of the grantor, which will avoid a voluntary assignment, need not be an actual corrupt intent. The law imputes a fraudulent intent if the thing done is unlawful and naturally results in hindering, delaying, and defrauding creditors. And this rule applies equally where the matter or act that is unlawful is shown by extrinsic evidence, as when it appears on the face of the deed. Marks *v.* Bradley, 69 Miss. 1, 10 So. 922.

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that, as complainant would not allege an intent to defraud, or that the conveyance operated as a hindrance or delay to creditors, or that Strong was insolvent, he cannot do so or make the proof to sustain such an allegation and the demurrer should be sustained.

Our view of the case is sustained by Mr. Bump in his work on Fraudulent Conveyances (2d ed.), pp. 273 and 274, and the authorities there cited.

The bill is fatally defective in not alleging the insolvency of Mrs. R. A. Strong, complainant having a judgment against her for the same indebtedness, and there is nothing in the bill of complaint to show that complainant has exhausted his remedies against her, R. A. Strong, or to show that she had no property at the time of the conveyance which is attacked. If she was solvent then the conveyance to E. H. Strong, Jr., could not have defrauded complainant, and for a failure to allege the insolvency of R. A. Strong, there is no equity in the bill and the demurrer should be sustained.

Brief of Barry & Beckett:

This is a bill filed under Code of 1880, section 1843, to subject to the payment of an unpaid judgment in favor of appellee, John Paret, against the appellant, E. H. Strong, Sr., certain lands, which said appellant obtained by exchange for other lands, and took the title in the name of his son, the other appellant, E. H. Strong, Jr., whereas the bill alleges that the consideration was paid entirely and exclusively by said E. H. Strong, Sr., and

Where the necessary consequence of a written instrument is to hinder, delay, or defraud creditors, the maker will be held to have intended to accomplish this, and as to them, it will be declared fraudulent without reference to the actual intent. Harman *v.* Hoskins, 56 Miss. 142.

A conveyance in honest payment of a debt is not rendered fraudulent because brought about by the action of other creditors in pressing for collection of their debts. McAllister *v.* Honea, 71 Miss. 256, 14 So. 264.

A conveyance made to hinder, delay, or defraud creditors is only void as to them; it is good as against the grantor and his heirs. Shaw *v.* Millsaps, 50 Miss. 380.

A conveyance by a husband to his wife of property worth $6,500, for a consideration of $400, is voluntary, and invalid as to the husband's creditors, prior or subsequent. Wynne *v.* Mason, 72 Miss. 424, 18 So. 422.

The burden is on the grantee in a voluntary conveyance to show that the grantor retained other specific property readily accessible, and ample for the discharge of his debts. Ames *v.* Dorrah, 76 Miss. 187, 23 So. 768.

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that there was no consideration from E. H. Strong, Jr., for the deed to him. To this bill a demurrer was sustained because the bill failed to allege that this was all the property the father had. An amendment was immediately made by interlining, stating that this was all the property the father had, or had had since, and the amended bill was demurred to, the defendants claiming that the bill should either aver that the father was insolvent at the time, or that the deed was made for the purpose of defrauding creditors.

It is laid down by our Supreme Court that "good pleading only requires the complainant to state a *prima facie* case." Dodge *v.* Evans, 43 Miss. 570, 579.

And this principle is reaffirmed in Belcher *v.* Mhoon, 47 Miss. 619, 620; Bell *v.* Gordon, 55 Miss. 49, 50; Greene *v.* Williams, 58 Miss. 758, 759.

The complainant is not required to state a fact the *burden of proof* of which is on the defendant. Dodge *v.* Evans, 43 Miss. 579; Amory *v.* Brown, L. R., 8 Eq. 663; Lipscomb *v.* McClellan, 72 Ala. 158, 159.

Now both of these conditions attach to a voluntary deed. It is *prima facie* void as to existing creditors, and the burden of proof is on the donee to show that it is not. Cowen *v.* Alsop, 51 Miss. 162, 163; Cock *v.* Oakley, 50 Miss. 630, 631; Buchanan *v.* Buchanan, 72 Ala. 55, 57; Lipscomb *v.* McClellan, 72 Ala. 158, 159.

Wherefore, we think, the demurrer to the amended bill was properly overruled. It was not necessary to aver that the father was insolvent. The bill shows that he conveyed away all the property that he had. It would be a strange perversion of justice if a solvent man could *give away all his property,* and yet the gift

A grantee in a voluntary conveyance must show, as against pre-existing creditors of the grantor, that the grantor left out of the conveyance property easily accessible to execution, amply sufficient in the ordinary course of events to satisfy his then existing liabilities. Golden *v.* Goode, 76 Miss. 400, 24 So. 905.

Where an action is brought to set aside a fraudulent conveyance, the facts constituting the fraud should be positively alleged in the bill, if known to complainant, otherwise they should be alleged on information and belief; and hence a petition alleging fraud in general terms only is insufficient. McInnis *v.* Wiscasset Mills, 78 Miss. 52, 28 So. 725.

In a suit to set aside a conveyance made by a husband to his wife, as in fraud of creditors, the burden is on complainant to show the fraud. Virden *v.* Dwyer, 78 Miss. 763, 30 So. 45.

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be good, because he was able to pay his debts, and yet would not do it. In the case last cited it was shown that Mrs. Cock had $5,000 or $6,000 left, and yet the court say that is no defense. Cock *v.* Oakley, 50 Miss. 631.

A solvent man has no more claim to give away *all* his property than an insolvent one.

The appellant's brief proves too much. It shows that in Indiana a voluntary conveyance is *prima facie* valid, and the burden of proof is on the creditor. Hogan *v.* Robinson, 94 Ind. 138.

Appellant now, for the first time, objects that the bill does not show Mrs. R. A. Strong to be insolvent. No such point was made in the demurrer; if it had been the bill might have been amended in this respect if necessary. But the Supreme Court has adopted that line of decisions which holds that the fraudulent grantor or judgment debtor is not a necessary party to a bill to reach and subject the property in the hands of the grantee and donee. It would be a great hardship to throw on the creditor the burden of proving all the private affairs of the debtor and his family in order to defeat a plain voluntary gift of his property against a debt due at the time. Such things are peculiarly within the knowledge of the family and the burden is properly on them.

OPINION.— COOPER, C. J., delivered the opinion of the court:

Had the complainant charged that the conveyance by his debtor to his son was voluntary, *prima facie* the conveyance would have been fraudulent and it would have devolved upon the grantee to show it was not, by proving that the debtor received ample visible property for the payment of his debts. But the allegations of the bill are that the debtor was the owner of a large and valuable plantation which he conveyed to Stark and received the lots conveyed to his son as "part payment."

It is true, he says, in a sentence, the grammatical construction of which refers to the lots, that "this was all the property he had or has since had," but this is contradicted by the allegation that he had a large and valuable place which he sold to Stark, accepting the lots in part payment thereof.

Construing the pleadings most strongly against the pleader, we are of opinion that the bill itself suggests, if it does not aver, that

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the debtor retained a considerable estate in his hands, and since the debt sought to be enforced is small, the reasonable inference from all the allegations is that the debtor reserved sufficient property to satisfy the complainant's debt. Under the circumstances, the conveyance to the son, though voluntary, would not be fraudulent and the demurrer should have been sustained.

Decree *reversed*, demurrer sustained, and bill dismissed.

WIRT ADAMS, Revenue Agent, *v.* OFFICERS OF COURT.

Rule Nisi — Court Officers — Scire Facias.

Officers of court cannot by a mere motion for a rule *nisi* obtain judgment thereon, there being no legal foundation for such an extraordinary proceeding, and a *scire facias* issued on such a rule will be quashed and judgment vacated.[1]

There was instituted in the Circuit Court of Jefferson county two suits styled "Wirt Adams, revenue agent, for the use of Jefferson county *v.* F. A. Cameron et al.," and upon which judgment was rendered for plaintiff. After execution had been levied upon property of the defendant, plaintiff settled both causes upon a stipulated payment, and released the defendants from the costs incurred in the suits, and from the principal amount. Whereupon, on the 26th day of May, 1885, the "officers of court" of Jefferson county, filed a motion in the Circuit Court for a *rule nisi* requiring the plaintiff to pay all the costs incurred by him in the two suits against Cameron et al. Default having been made on said rule, a scire facias was awarded accordingly. In answer to said writ, appellant denied that he was amenable to the sum-

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The office of a scire facias is to revive and have execution of a judgment. Hughes *v.* Wilkinson, 37 Miss. 482.

Where a scire facias is issued without authority of law, the defendant may, after plea, and verdict, and judgment against him, and at the same term at which the judgment is rendered, move to quash the scire facias. Locke *v.* Brady, 30 Miss. 21.

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mary jurisdiction of the said Circuit Court, individually, or as said revenue agent, by motion, rule, or otherwise, and that said writ showed no liability to the said "officers of court," and requested that the writ scire facias be quashed and the rule *nisi* be vacated. On November 24, 1885, issue having been joined, on motion of plaintiff, the rule *nisi* was made absolute, and judgment rendered thereon for $384.90, and from this judgment defendant appeals.

APPEALED from the Circuit Court, Jefferson county, J. B. CHRISMAN, Judge.

Reversed and dismissed, March 15, 1886.

Attorneys for appellant, L. Brame and A. M. Lea.

Attorneys for appellee not named in record.

Brief of L. Brame:

* * * The appellant appeared and filed a demurrer to the so-called scire facias, setting up the following grounds that present at once the whole question as to the liability and the power of the court in that form of proceedings:

"1. That he is not amenable to the summary jurisdiction of this court individually or as said revenue agent, by motion, rule, or otherwise.

"2. That the said matters and things recited in said writ of scire facias disclose no liability of the respondent to said officers of court either individually or officially."

This demurrer sharply and clearly brought to the attention of the court the obstacles which prevented, or should have prevented, any other step against the appellant.

But, without noticing this demurrer, and having made no disposition of it whatever, without any plea or answer raising an issue of fact, the court, *on a mere motion* of the officers of the court, entered a *final* judgment against the appellant for $384.90 and costs of this proceeding.

Aside from the other questions, this was error. Marlow *v.* Homer, 6 How. 189; Mayfield *v.* Barnard, 43 Miss. 270.

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Even if there had been no appearance, a judgment by default on the showing made in this record would have been void. Turner *v.* McAdory, 58 Miss. 27.

Brief for appellee not found in the record.

OPINION.— CAMPBELL, J., delivered the opinion of the court:

We are not aware of any legal foundation for the proceeding which terminated in the judgment appealed from. No law authorizes a motion, judgment *nisi*, scire facias, and final judgment in such case, and the judgment is reversed, the judgment *nisi* vacated, and the proceeding dismissed, leaving the officers of court to pursue their rights in some manner authorized by law as they may be advised.

Reversed.

DOCK BISHOP *v.* STATE OF MISSISSIPPI.

Criminal Law — Trials — Application for Continuance — Evidence.

Defendant will not be granted a continuance where he has not exercised due diligence in procuring the attendance of his witnesses by whom he expects to prove facts material to his defense.[1]

Same. Neither will he be entitled to a continuance on such grounds where the facts to be testified to by such absent witnesses were proven by other witnesses.

James Bishop, Dock Bishop, and Robert Lamar were jointly indicted for murdering one Wise. There was a severance, and Dock Bishop was tried, convicted, and sentenced to death; whereupon he appealed to the Supreme Court.

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The granting or refusing a continuance is peculiarly within the discretion of the court, and cannot be re-examined in the appellate court. Noe's case, 4 How. 330; Muirhead *v.* Muirhead, 6 S. & M. 451.

The exercise of this discretion cannot generally be assigned for error. Bohr *v.* Steamboat Baton Rouge, 7 S. & M. 715.

A continuance is allowed for the absence of a witness only where the proper steps have been taken to procure his attendance. Week's Case, 31 Miss. 490.

And if the court were to commit an error on the showing then made, in refusing a continuance, it will be cured by the subsequent appearance of the witness in time to testify on the trial. Week's Case, 31 Miss. 490.

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Statement of the Case.

There was much testimony in the trial court, and many errors were assigned by appellant, but it will be sufficient to a proper understanding of the case to consider only those touched upon by the reviewing court.

Application was made by defendant in the trial court for a continuance, and in support of this application the following showing was made:

Dock Bishop being duly sworn deposed that he could not safely go to trial at that term of court on account of absent witnesses, who were material to his defense, to-wit: a man whose name was unknown to defendant, but known to C. E. Butler of Oxford, Miss., and the town authorities of Bolivar, Tenn., who told said authorities and the said Butler that one Evans Ford told him (said witness) that he (Ford) and others, whose names were not remembered by said witness (but who were neither of defendants), killed Wise in Calhoun county, Miss., and detailed to Butler the circumstances of such killing and told Butler that the watch taken from the dead body of Wise was then (only a few weeks prior to trial day), at the time he was talking to said Butler, in possession of a person at Mrs. Smith's, near and west of Holly Springs, Miss., and near the new railroad there; and that defendant expected to prove by said witness the truth of the statements made by him to the said Butler; that said witness had not been subpœnaed because he was temporarily beyond the jurisdiction of the court; but that defendant was informed that he resided in Mississippi, and that compulsory process would procure his attendance at the next term of the court; that defendant had had no opportunity to have such compulsory process, and that defendant knew of no other witness by whom he could prove the same facts; and that he expected to have said witness in attendance at the next term of court; that by John A. Mathews,

The application was based on the absence of a witness, who was desired only for the purpose of impeaching a witness for the State, by proving that the State's witness had said that if he could not convict the accused by telling the truth, he would do it otherwise. *Held*, that a continuance was properly refused. Lundy's Case, 44 Miss. 669.

The granting and refusing of a continuance is within the discretion of the court and cannot be assigned as error. Appellate tribunals interfere with the exercise of this discretion with extreme reluctance and caution, and only when a palpable error has been committed, without the correction of which, manifest injustice would be wrought. Noe's Case, 4 How. 330; McDaniel's Case, 8 S. & M. 401; Lundy's Case, 44 Miss. 669 (citing Ogle's Case, 33 Miss. 383).

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who had been duly subpœnaed, he expected to prove that said Mathews had the deceased staying at his (Mathews') house, and that he and Mathews were concocting a scheme to entrap and arrest Dock Bishop and Bob Lamar; that Wise was at Mathews' house a few minutes before the killing, and that Jim Bishop, codefendant, was on friendly terms with Wise, and that he (Jim Bishop) went in advance of Wise without any gun or any weapon by which such wound could have been inflicted on the person of deceased as was inflicted; that Mathews and this defendant were personally hostile to each other and had been enemies ever since a period long before the killing of Wise; that by Joe Lafayette, Alice Lafayette, and Asa Fleming they saw Jim Bishop immediately after the killing and heard all he said, and heard the reports of the guns and pistols in the direction of the place where the killing occurred; and that the acts, declarations, and conduct of Jim Bishop were inconsistent with his guilt and in no wise inculpated this defendant; that no one was with Jim Bishop when he came to their home; that they saw Jim Bishop at their home less than two minutes after the firing; that the distance was too great for him to have traveled within the time from the sound of the firing until his arrival at their house. By Joe Jones that he was at the scene of the killing shortly thereafter, and at the grave at, and immediately preceding the disinterment of the dead body of deceased, and that he saw and heard things which defendant was informed and believed were material to his defense;

An affidavit for a continuance, on the ground of absence of witnesses, should show diligence in procuring their attendance, and an expectation that their attendance will be procured at the next term. Noe's Case, 4 How. 330.

In this State, by statute, upon every application for a continuance, the applicant must state in his affidavit the facts which he expects to prove by his absent witnesses, in order that the court may judge of the materiality of the facts to the issue in the cause; and the statute applies alike to criminal and civil cases. McDaniel's Case, 8 S. & M. 401; Code of 1857, p. 503, art. 151; Code of 1871, § 633.

To entitle accused to a continuance because of the absence of a witness, he should promptly have the witness summoned, and ask for an attachment if he fails to appear; must, if the case be capital, apply for a continuance before the special venire is drawn; must set out in his affidavit the name and residence of the witness and the facts expected to be shown by him, and also show what steps have been taken to secure his attendance; must negative the idea that he is absent with his consent or procurement, and state the cause of such absence if known. If the continuance be refused, he must sue out the proper process for the witness, and, when the case is called for trial, must again

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that defendant did not know what his (Jones') testimony was, or would be, as he had had no chance to confer with him; that defendant was informed that May and J. C. Hollingsworth knew something material to his defense, but that he did not know what that might be, and that he had only recently heard of it, and that he had had no opportunity of conferring with such parties; that by John Lamar that he (defendant) voluntarily surrendered himself and went into the custody of the jailer of Lafayette county with full knowledge of the fact that defendant was accused of killing Wise; that by A. E. Peden and Ed Smith, the testimony of State's witnesses before the coroner's inquest did not, in any way, inculpate the defendant, and that such testimony was contradictory to the testimony attempted now to be given by the same witnesses, and that such witnesses were among the most important of the State's witnesses; that defendant had been in close confinement ever since indictment found; that he was innocent as to the crime charged against him, and that he had been at a great loss to know the kind of testimony that would be adduced against him; that he and counsel had endeavored to see the testimony taken in writing at the coroner's inquest; and that failing to find it at Pittsboro (the county seat), where it ought to be, that he had subpœna *duces tecum* issued for A. E. Peden and Ed Smith to come into court and bring such testimony; and that compulsory process would procure their attendance, and that of all the other witnesses, and that defendant had had no oppor-

apply for a continuance, making such changes in his affidavit as the conditions then require; if it is still refused, he should persist in using process to compel the attendance of the witness on the trial, and on the hearing of a motion for a new trial. If the witness cannot be had, his *ex parte* affidavit, if obtainable, must be presented on a motion for a new trial. If this is not done, he cannot complain on appeal. Lamar *v.* State, 63 Miss. 265; Lea *v.* State, 64 Miss. 294, 1 So. 244.

It is proper to refuse a continuance because of the absence of a witness, unless the facts proposed to be proved by him are pertinent and material. Sellars *v.* Kelly, 45 Miss. 323.

It is not error, even in a capital case, to refuse a continuance because of an absent witness, where no sufficient efforts to procure his attendance have been made. Thomas *v.* State, 61 Miss. 60.

Hence, where a defendant has negligently omitted to ask a subpœna for a codefendant in time for service before the trial day, a continuance because of his absence is rightly refused. Gibson *v.* State, 59 Miss. 341.

And it is not an abuse of discretion to refuse a continuance because of the absence of a witness, though material, where the witness has never been

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tunity of having such compulsory process issued; that none of the said witnesses were absent by the procurement or consent of defendant or any one for him; that he had process and subpœnas issued as soon as he learned of the materiality of the evidence; that all of the said witnesses resided in Mississippi; that this application for continuance was not made for delay, but that justice might be done; and that this was the first application defendant had made for a continuance.

This application was, by the court, overruled, and the defendant placed upon trial.

One Amet, a witness for the State, testified, in some respects, differently in the Circuit Court to what he did before the coroner. By consent, one of defendant's witnesses testified that Amet's reputation for truth and veracity was good.

APPEALED from Circuit Court, Calhoun county, A. T. ROANE, Judge.

Affirmed.

Attorneys for appellant, Sullivan & Sullivan.

Attorney for appellee, T. M. Miller, Attorney-General.

Brief of Sullivan & Sullivan:

* * * The court erred in overruling the defendant's application for a continuance. The Mississippi reports show no

summoned, and it is not stated that his attendance is expected at the next term. Insurance Co. *v.* Brown, 57 Miss. 308.

It is not error to refuse a continuance applied for because of the absence of a witness, where it is shown that he is a transient person, without business or other ties in this State, and that the applicant has no knowledge of his whereabouts, and there is no reason to believe that his testimony could be procured in future. Carberry *v.* Burns, 68 Miss. 573, 9 So. 290.

Where the record shows no attempt to obtain compulsory process except as to one witness, and as to that one it is not shown that the witness could not have been brought into court if attached, it is not an abuse of discretion to refuse a continuance on the ground of the absence of witnesses. Stewart *v.* State, 50 Miss. 587.

Where, in a murder trial, the defendant obtains a continuance, because of the absence of certain witnesses as to his character for peace, and the bad character for veracity of the principal witness for the State, the places of residence of the witnesses not being stated, and no subpœna being issued for them; and afterward, on a change of venue, the defendant moves for a continuance upon the same showing, the witnesses being still not subpœnaed, and

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instance, so far as I know, in which a case has been reversed for failure of the court below to grant a continuance. We think this case should begin the exception.

A great and dastardly crime had been committed. The circumstances were such that public *suspicion* naturally (whether justly or not) attached to defendant. Suspicion is always unfavorable to free inquiry, fair investigation, and impartial judgment. * * *

Defendant was sick, too sick to be tried. It was practically a denial of a fair and impartial trial of defendant to force him to be tried for his life when he was in a condition physically and mentally which rendered him unable to aid his counsel in the examination of witnesses and the proper preparation of the case. Defendant swore that was his condition.

The State introduced three physicians, Drs. Buchanan, Baker, and Dorroh, who examined defendant and two of them, Drs. Baker and Dorroh, testified that defendant was too sick to be tried. Dr. Buchanan *alone* thought he was not too sick to be tried, but even Dr. Buchanan said he did not know what is required for a man to be well enough to be tried. All testified that defendant was sick. There was no other testimony on this point. We have yet to learn that law and medicine are so necessarily connected that the mere external glance of the judge is a better evidence in a capital case of the mental and physical condition of a prisoner than the sworn testimony of medical physicians and

it not being averred that there were no other persons by whom the facts could be proved, the action of the court in overruling the application will be held correct. Smith *v.* State, 58 Miss. 867.

Unless it be shown that discretion has been abused, a judgment will not be reversed because of the action of the court in disposing of an application for a continuance. Insurance Co. *v.* Green, 52 Miss. 332; Solomon *v.* State, 71 Miss. 567, 14 So. 461.

Where, in a murder case, an application for a continuance is made on the ground of the absence of witnesses, by whom the accused states he expects to prove an alibi, and because of the excitement against him in an adjoining county witnesses were deterred from appearing to testify in his favor, but he admits that there are several persons present by whom he can prove the alibi, and on the trial eight or nine witnesses testify to the same, there is no error in refusing a continuance. Nelms *v.* State, 58 Miss. 362.

An application for a continuance based on the physical or mental condition of accused is addressed to the discretion of the trial court. Lipscomb *v.* State, 76 Miss. 223; 25 So. 158.

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experts after examination, so that the arbitrary opinion of the judge should outweigh the sworn statements of the defendant and doctors.

Defendant had two counsel, Sullivan & Sullivan. W. V. Sullivan was entirely kept away from court on account of severe illness. The other counsel, H. M. Sullivan, was detained by subpœna from the Mississippi Legislature as a witness about the State university. Appointed counsel, of course, had no time to prepare in such a case. The case was set for a day so late it was impossible to try it during the term. Why try Bishop, sick, and under all these circumstances, and not try Lamar when he was well and ready and clamoring for a trial. * * *

The court would not allow N. E. McKenzie to tell the curious tales Ed Amet told the coroner's jury. But the court allowed the State to *bolster up* the witness Amet by allowing the district attorney to formulate Amet's latest speech criminating defendant, and repeat it to Elias Knight, Dr. Wait, and others, and ask if Amet did not tell the grand jury that. Is that proper?

The court further allowed the witness Amet to be *bolstered up* by permitting W. L. Harelson, a stranger to Amet, to testify that whilst he knew nothing of Amet's general reputation for truth and veracity in the neighborhood in which Amet lived, yet he, witness, was permitted to testify, it is good so far as I know, I have never heard it assailed. I have only known him since the Wise murder and I live here in town. * * *

An accused is not entitled to a continuance as for physical and mental incapacity simply because his physician testifies to that effect. Lipscomb *v.* State, 76 Miss. 223, 25 So. 158.

A motion in a criminal case for a continuance to procure absent witnesses cannot be granted where the evidence of such witnesses would be cumulative. Wells *v.* State, 18 So. 117.

A motion for continuance on account of the absence of a witness was properly denied when defendant did not ask for compulsory process to constrain the appearance of the witness, who had been subpœnaed, and did not ask a continuance until such process could be executed. Cannon *v.* State, 75 Miss. 364, 22 So. 827.

Accused had process issued for witnesses within easy reach, which had not been returned, although ample time had elapsed, when he was called for trial; and upon this ground he applied for a continuance, averring his ability to prove by these witnesses what would have been a complete defense. *Held*, that a refusal of the continuance was error. Williams *v.* State, 23 So. 547.

Under Code 1892, § 1425, regulating the subject, where a defendant in a criminal case had not had opportunity to obtain compulsory process for a

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The court erred in granting the charge for the State No. 1. If, by it, it was intended to tell the jury that there is no difference between circumstantial and direct evidence as to the care and caution in applying it, then this is error. Algheri *v.* State, 25 Miss. —; Josephine *v.* State, 39 Miss. —. * * *

The distinction between direct and circumstantial evidence as to its force and its application is universally recognized. Starkie, Evidence, 865. * * *

The first charge given for the State is in conflict with charge No. 3 for defendant and No. 7 for defendants. Cunningham's Case, 56 Miss. 269; 55 Miss. 476; Archer *v.* Sinclair, 49 Miss. 343; 24 Iowa, 582; 20 Ohio St. 223.

The second instruction for the State is erroneous in two respects.

First, the words "beyond every reasonable doubt arising out of the evidence" or similar words should follow the words "to a moral certainty." * * *

The charges asked by defendant and refused by the court, numbered 1, 2, and 3, should have been given. One and 3 are almost literal copies of Starkie's Evidence and are applicable to the evidence. See the alleged extrajudicial statement of defendant detailed in Ed Amet's and H. C. Lamar's testimony. * * *

The court fatally erred in giving for the State the following charge:

"Although the jury may believe from the evidence that Amet was before the grand jury and there testified to facts within his

witness on account of whose absence he desired a continuance, and the facts which he expected to prove by him were material to the defense, and such process would probably have procured his presence, it was error not to have continued the case, or postponed it to another day, although the prosecuting attorney admitted that the witness, if present, would have testified as shown in the affidavit. Montgomery *v.* State, 85 Miss. 330, 37 So. 835.

Where a witness, on account of whose absence a continuance in a criminal case was asked, was shown by the record to have been duly subpœnaed, and to live a short distance from the courthouse, and to be too sick to attend the trial, and these facts were not contested by the State, and the testimony of the witness was material, the trial should have been postponed until the attendance of the witness could have been procured, although the prosecuting attorney admitted that the witness, if present, would testify as stated in the application. Caldwell *v.* State, 85 Miss. 383, 37 So. 816.

On prosecution for murder, the accused moved for a continuance because of the absence of a material witness, whose name he had just learned the day of the trial. *Held*, that the application for a continuance should have been granted. Whit *v.* State, 85 Miss. 208, 37 So. 809.

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knowledge, and afterward when the defendants had all been arrested and were in custody, Amet told Mrs. Lamar, Elias Knight, and others of the facts within his knowledge and further stated to them that he had made such statements to the grand jury. Such statements alone do not necessarily destroy the credibility of the witness."

This instruction is subject to many objections. First it points out the witness Amet by name. This is error. 56 Miss. 791. * * *

This is a direct charge both upon the weight and credibility of the evidence and this is error and prejudicial error for the whole case. Defendant's life depends upon the weight and credibility of Ed Amet's testimony. Without his testimony there is no case against defendant whatever. The jury are the exclusive judges of the evidence, both as to its weight and credibility. Ned & Taylor *v.* State, 33 Miss. 364; George *v.* State, 39 Miss. 570. * * *

If the jury were informed that the statements contained in that charge did not destroy the credibility of Ed Amet, then the jury might well consider whether they had a right to consider that any of the other evidence or all of it destroyed Amet's testimony, and to be in doubt whether or not they or the court were the judge of the credibility of the evidence or its weight. * * *

Brief of T. M. Miller, Attorney-General:

* * * The case was continued once on the application of defendant. There was no error in refusing the last continuance applied for over a year after the finding of the indictment. As defendant failed to bring himself within any of the requirements of the rule on that subject, so clearly laid down in the case of Lamar *v.* State, I shall not further discuss the matter of the refusal of the last continuance. * * *

So far as the sickness of defendant or his counsel are concerned, it is proper to say that the testimony touching the former satisfied the court (before whose eyes sat the accused) that he was well enough for all practical purposes. The ground of illness was the last thing reserved. The record shows abundantly that there was nothing in the defendant's physical condition that impaired his capacity for making such a defense as he desired and intended to make. Bishop had abundant counsel, and the record will show that their energy could not have been surpassed. * * *

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The instructions were unexceptionable in my judgment and require no argument. * * *

I may safely submit the case, merely requesting the court to glance over the testimony.

Even without Amet's evidence, there would have been sufficient to justify the jury in rendering a verdict of guilty; but, with Amet's, every shadow of doubt is removed. The attempt to break him down was a failure because, few persons situated as he was, the threat of these desperadoes hanging over him, would have dared to disclose the truth any sooner than he did.

OPINION.— ARNOLD, J., delivered the opinion of the court:

A careful examination of the record disclosed no error for which the judgment should be disturbed. The errors assigned are numerous, but the most of them are so plainly without merit that they do not require or admit of discussion.

The action of the court in refusing the application for continuance is vindicated on either of the grounds, that the appellant did not show proper diligence in procuring the attendance of his witnesses, or that the material facts which he alleged he expected to prove by absent witnesses were put in evidence by other witnesses in his behalf. If it be admitted that the *contrariant* statements made by the State witness Amet did not authorize the admission of testimony on the part of the State, as to his general reputation for truth and veracity, it affords no just ground of complaint for appellant, for the reason that by consent, and without objection, one of his own witnesses testified that Amet's reputation for truth and veracity was good, and what the witnesses for the State afterward said on that subject was merely cumulative. Amet's reputation, in the absence of proof to the contrary, was presumed to be good, and was proved to be good, without reference to the State witnesses on that point.

We are of opinion that instructions given fairly announced the law applicable to the facts of the case, and that the instructions asked by appellant and refused were properly refused, and that the verdict was warranted by the evidence.

Affirmed.

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STATE OF MISSISSIPPI et al. *v.* R. B. RIALS et al.

Pleas — Statutory Requirements — Filing.

The statute requires that defendant shall plead on or before the second day of the return term and that issue of fact shall be made up and joined at that term, and ready for trial at the next succeeding term; but a large discretion is vested in the circuit judge in the matter.[1]

Same.

At the second term of court after suit brought, a cause is tried two weeks after filing pleas; motion is made to strike out the pleas, and disposed of, and the court offered to continue the cause of action several days before the trial. *Held*, that there was no abuse of discretion in the action of the court, and the plaintiffs were not prejudiced thereby.

The statement of the facts in this case are found in the opinion.

APPEALED from Circuit Court, Copiah county, T. J. WHARTON, Judge.

Affirmed, February 23, 1885.

Attorney for appellant, Joe Purser.

Attorneys for appellee, W. P. & J. B. Harris.

Brief of Joe Purser:

The pleas in this case were filed without leave of court, and the motion of plaintiff to strike them out should have been sustained by the court. * * *

This court, in Pool *v.* Hill, 44 Miss. 306, construed section 1703, Revised Code of 1880, and the court held "the rule or otherwise" referred to in said section did not extend beyond the term

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The Circuit Court has power, before judgment rendered, to allow a defendant to plead out of time where a reasonable excuse is offered. (Pool *v.* Hill, 44 Miss., explained.) McAdory *v.* Turner, 56 Miss. 666.

Although leave to plead out of time must affirmatively appear of record, where the point has not been made in the lower court, it is too late to urge in the Supreme Court that a special plea was filed without leave, and, therefore, should have been stricken out. Pfeifer *v.* Chamberlain, 52 Miss. 89.

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It is perfectly plain from this that before defendants could be allowed to file their plea at a term subsequent to the appearance term, they must have had an order made giving them time. * * *

In 56 Miss. 666, the court held that defendant might plead out of the proper time by showing good reasons for having not plead in time. But in the case at bar the defendants not only fail to give a reasonable excuse for not having plead in time, but plaintiff showed that defendant was utterly without any excuse. The mere statement of counsel that the practice has prevailed here to plead any time up to the time of trial should not have any weight with the court. The only answer we make to the statement relative to the practice is that a plain statutory provision will surely prevail with this court over mere practice or custom. * * *

Brief of W. P. & J. B. Harris:

The court below had a right to allow the defendants to file their plea when it was filed, and did not err in overruling plaintiff's motion to strike out the plea. Until judgment, the court had control of the matter, and could, upon sufficient cause shown, allow defendants to plead out of time. Pfeifer *v.* Chamberlain, 52 Miss. 91; McAdory *v.* Turner, 56 Miss. 666.

These authorities are directly in point. Hodge *v.* Darden, 51 Miss. 200.

The suggestion by counsel for appellants that leave of the court should have been first obtained is without force. The point was not raised in the court below. Pfeifer *v.* Chamberlain, *supra.*

On the hearing of the motion appellees proved the custom of the bar to be to file pleas at the trial term.

Appellants were in no way prejudiced or injured by the action of the court. The case was not tried for some time after the court overruled the motion to strike out the plea, and besides the court offered to give appellants a continuance which he refused and announced himself ready for trial. * * *

OPINION.— ARNOLD, J., delivered the opinion of the court:

This was a suit against Rials and his sureties on a retail liquor bond. The breach of the bond, alleged in the declaration, was that Rials had sold and given away vinous and spirituous liquors

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to a certain minor contrary to law. At the term of the court to which the writ was made returnable, the death of Rials was suggested and the cause continued with leave to revive in the name of his personal representative when known. At the next term of the court, the sureties on the bond filed two pleas, and a motion was made to strike them out and for judgment for the plaintiffs on the ground that the pleas were filed out of time and that the second plea was frivolous. The motion was sustained as to the second plea, but overruled as to the first, and at the same term the cause was tried and resulted in a judgment for the defendants and the plaintiffs appealed.

The errors insisted on here are that the court erred in refusing to sustain the motion to strike out the pleas and in overruling the motion for a new trial. The statute requires that the defendant shall plead on or before the second day of the return term, and that issue of fact shall be made up and joined at that term and ready for trial at the next succeeding term, but a large discretion is vested in the circuit judge in the matter. McAdory *v.* Turner, 56 Miss. 666; Pfeifer *v.* Chamberlain, 52 Miss. 89.

As the cause was tried at the second term of the court after suit brought but not until more than two weeks after the pleas were filed, and not until several days after the motion to strike out the pleas was overruled, and as the court, after the motion to strike out was disposed of, offered to continue the cause, if plaintiffs desired to do so, it does not appear how the plaintiffs were prejudiced by the action of the court or that there was any abuse of discretion in the action of the court. There is no error in the record.

Affirmed.

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J. H. TANT v. JAMES M. SMITH.

Trial — Evidence — Motion to Exclude.

On motion made by plaintiff, after testimony is closed, to exclude evidence in regard to indorsement of certain notes and written contract, it is discretionary with the court as to whether another witness shall be introduced to testify on such subject-matter and to produce the notes.[1]

Tant was judgment creditor of Georgia Anne and Rufus Collins, the latter being usee for William Collins, in sums of $56 and $139.75 respectively. He suggested writs of garnishment against John Perkins and Ella Perkins, as debtors of defendants. Perkins answered that he had bought a piece of land from defendants and that he had given his notes for $600 in payment of same.

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It is in the discretion of the court to allow a witness to be examined after the cause has been argued and the jury charged. Witherspoon *v.* Cain, Walk. 407.

Generally, additional witnesses should not be allowed after the evidence is closed, but the court may admit them in furtherance of justice; but this is a matter of discretion, for which an appellate court would not reverse, except in an extreme case, where the injustice committed by a departure from the rule was manifest and great. Hoover *v.* Pierce, 4 Cush. 627.

The order of introducing testimony is within the discretion of the trial court. Error cannot be predicated of this unless the discretion is abused. Myrick *v.* Wells, 52 Miss. 149.

Except where secondary evidence is offered and the absence of the original must first be accounted for, the court will not control the order of the introduction of testimony. Davany *v.* Koon, 45 Miss. 71.

Evidence competent for any purpose should not be excluded on a general objection. Mississippi Mills *v.* Smith, 69 Miss. 299, 11 So. 26.

Where an objection to evidence is in its nature such as may be obviated, it must be specific, so as to allow opportunity to supply its place if the objection be sustained, otherwise the objection will not be noticed in this court. Heard *v.* State, 59 Miss. 545.

In an action to recover of a telegraph company for loss caused by delay of certain telegrams between plaintiff and a broker, giving directions as to the purchase and sale of stocks, where the only evidence as to the loss is, in general terms, that by the delays plaintiff lost certain sums, which he paid, a verdict for plaintiff therefor will not be set aside where defendant failed to require of the witness a more explicit statement as to how the delays of the telegrams caused the loss. Telegraph Co. *v.* Littljohn, 72 Miss. 1025, 18 So. 418.

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Statement of the Case.

George C. Paine, J. M. Smith, and Clorinda Collins prayed to be made parties to the suit as claimants to the money garnished, and set up in their petition that the notes were given to Clorinda Collins, William Collins, and Rufus Collins; that Clorinda Collins owned a one-fourth interest in said notes, and that the balance was due to Paine and Smith who were purchasers of same, and that such notes were duly transferred before garnishment process; that garnishees were residents of Lowndes county and had no notice of the transfer of the said notes; that the notes then were in possession of claimants, and that garnishee's answer was untrue and that he was not indebted to defendants. Claimants asked to be allowed to traverse garnishee's answer. The court granted claimant's petition, whereupon garnishee filed an amended answer in accordance with the facts alleged by claimants.

Clorinda Collins propounded her claim for one-fourth of the proceeds of the notes and said that Tant had no judgment against

In its discretion, the court may permit a plaintiff to reopen his case and prove the value of property for the conversion of which he sues. Railroad Co. *v.* Bolls, 62 Miss. 50.

Where, on the trial of a claimant's issue, plaintiff in attachment closes without introducing the judgment against the defendant, and claimant moves for a peremptory instruction because of the omission, it is reversible error to refuse plaintiff leave then to introduce the judgment. Meacham *v.* Moore, 59 Miss. 561.

At the conclusion of the trial, as the jury retired, plaintiff excepted to a ruling of the court as to how much of defendant's affidavit for a continuance setting out the testimony of an absent witness was in evidence. Thereupon, the witness having arrived, the judge, of his own motion, recalled the jury and stated that he would allow the witness to testify and exclude the affidavit and, in the interest of justice, would reopen the whole case, for additional evidence, argument, and instructions on either side. The affidavit was excluded, and the witness testified on behalf of the defendant. This action of the court was proper, and is to be commended. Royston *v.* Railroad Co., 67 Miss. 376, 7 So. 320.

Where the attorney in an action against a railroad for failing to maintain cattle guards (Code 1892, § 3561) inadvertently failed to show that plaintiff's land was crossed by the road and was inclosed, or such evidence, though admitted, was not disclosed by the stenographer's notes, the court should have allowed plaintiff, at the close of defendant's evidence, to recall a witness to testify to such facts. French *v.* Canton, A. & N. R. Co., 74 Miss. 542, 21 So. 299.

Where plaintiff withheld an important witness until the defense closed, and then offered him on the main facts, such action, though very bad practice, and capable of working great injustice, was not, of itself, sufficient to cause reversal. Southern Ry. Co. *v.* Hays, 78 Miss. 319, 28 So. 939.

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her. J. M. Smith propounded his claim for three-fourths of the proceeds of the notes alleged by him to have been purchased for a valuable consideration without notice from the makers; and that he was indebted to George C. Paine in the sum of $140 for attorney's fees, and that after extinguishing his debt to Paine the balance should be paid to him, Smith, except the one-fourth interest of Clorinda Collins. Plaintiff traversed the claims of Clorinda Collins and J. M. Smith, and moved to strike from the files the claim propounded by Clorinda Collins because it was sworn to by Paine as attorney instead of by the claimant herself. This motion was overruled.

There was judgment for Clorinda Collins and J. M. Smith for one-fourth and three-fourths, respectively, of the proceeds of the notes, whereupon plaintiff appealed to the Supreme Court.

APPEALED from Circuit Court, Monroe county, J. W. BUCHANAN, Judge.

Affirmed, January 18, 1886.

Attorneys for appellant, Clifton & Eckford.

Attorneys for appellee, G. C. Paine, R. E. Houston, and G. Q. Buchanan.

Brief of Clifton & Eckford:

* * * We will dismiss assignments of errors Nos. 2, 3, and 4, together. The defendant claimed that the notes had been assigned to him by indorsement. Plaintiff supposed they would be introduced in evidence and made no objection at the time to parol proof of the written transfer.

When defendant closed without introducing the notes, plaintiff demanded them before entering upon the cross-examination of J. M. Smith. The court declined to compel defendant to produce the notes, but said we might prove their contents.

No prescribed notice is required to be given by statute, but on notice given it is made the duty of the court to order either party to give to the other, for inspection, any papers in their possession relating to the merits of the action.

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Here, good cause was shown, and notice had been given; and the papers demanded related to the merits of the action. The only discretion left to the court under this statute was the *time* within which he would require the production of the notes. The notes were in the possession of George Paine, the attorney, on his person in the court, and he should have been ordered peremptorily to produce them. The defendant's attorney had no right to withhold these notes, the withholding of them during the cross-examination of J. M. Smith was in violation of plaintiff's rights, and prevented a full and fair investigation of the case. After the cross-examination was over, and defendants had closed their case, plaintiffs moved to exclude all that part of J. M. Smith's testimony showing a written transfer of said notes.

"The court overruled the motion, but said unless the defendant produced the notes he would in effect charge the jury to find for plaintiff."

This testimony of J. M. Smith's, proving a written transfer of the notes, was incompetent testimony, and was admitted under the impression that the notes would be given in evidence, but as soon as we saw our rights were to be disregarded and that the notes were not to be in evidence, then we moved to exclude this secondary evidence. We submit to the court that, under such circumstances, we lost no right by not objecting to this incompetent testimony at the time it was offered. That in our efforts to obtain the notes, which we never despaired of until the case was closed, this secondary end will be treated as though it had gone to the jury over our objections, and that our motion to exclude properly presented the legal question. Then at this point, there is no doubt but what the court below erred in not excluding the parol testimony of the written transfer. Greenleaf on Evidence, § 84. * * *

Our motion should have been sustained; instead of this, the court of its motion reopens the case, which had been closed. * * *

The court had at a previous stage of the proceedings excluded all testimony of the contents of the written contract executed by J. M. Smith, except the fact that there was a written agreement for sale of land, etc. Our motion, made after the case had closed, sought to exclude also that fact. But the court reopened the case and permitted George Paine to go upon the stand, give his version of the transfer of the notes, prove the loss of this written contract, and the loss of it. * * *

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The charge given for defendant marked No. 1 is doubly erroneous. It is directly the converse of the law given to plaintiff in charge No. 6. * * *

For the law of the case, appellant's counsel cited the following authorities: Bump on Fraudulent Conveyances, pp. 286, 294, 296, 248, 229; Young *v.* White, 25 Miss. 146; Bump on Fraudulent Conveyances, pp. 244, 232, 234; Stovall *v.* Bank, 8 S. & M. 306; Bank *v.* Douglass, 11 S. & M. 469.

Brief of Paine, Houston, and Buchanan, on motion to dismiss, for appellee, Clorinda Collins, claimant:

* * * The bill of exception taken in this case, and no objection to the ruling of the court either in his judgment overruling the motion, or his final judgment, nor a motion for a new trial in the cause. * * *

There is no appeal bond for the Clorinda Collins judgment. Code 1880, § 2326.

When Clorinda Collins filed her claim, and issue was taken upon it, it was a suit within itself, separate and distinct from J. M. Smith, claimant, as replevin or trial of right of property. Atkinson *v.* Foxworth, 53 Miss. 741–747.

The case being separate and distinct from the suit of J. M. Smith, claimant, the two causes cannot be embodied in the same appeal. In fact J. H. Tant, the appellant, only petitions for an appeal from the Smith judgment, and gives bond accordingly. And while a record may be incumbered with much surplusage in such cases, and subject all parties to labor in culling out the improper objections, still we hope in this cause we have been enabled to do so, and ask that our motion to dismiss the appeal taken in the case of Clorinda Collins be sustained.

Brief of Paine, Houston & Buchanan:

* * * The testimony has been fairly put before the court, pro and con, as between Smith and Tant. The jury believed Smith, as any one would who heard the two men testify. * * *

On the cross-examination of J. M. Smith, the plaintiff proved that there was a written contract made by him for the transfer of the notes, which was in substance that he was to convey eighty acres of land to William and Rufus Collins when their interests in

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the notes were paid; that he then delivered the writing to G. H. Paine for them and had not seen it since. Appellant then demanded the production of the written contract. No notice, it seems, had been given by plaintiff for the production of the written contract or the notes. And it appears that the court made no error in its rulings on this subject from the fact that before the cause was submitted to the jury it was shown that the written contract for the conveyance of the land had been delivered to G. C. Paine for the Collins' and it was further shown by Mr. Paine that he had examined his papers to find the contract and after proper search could not find the same. It was the duty of the court to see if the paper could be produced, and if not, then it was competent for either party to make proof of this fact, and then of the contents of this writing. It does not appear that any testimony on this subject was improperly submitted to the jury.

The court did not err in overruling that part of plaintiff's motion "to exclude all that part of J. M. Smith's testimony which tended to show a written transfer on the back of the notes," since this written transfer was not all the evidence that went to show that the notes had been transferred, as Smith had repeatedly testified that all the parties interested in the notes had in person confirmed and ratified the trade not only by word of mouth but by delivery of the notes to him. The court made no error in permitting Mr. Paine after claimant had closed his testimony to testify as to the facts by him stated. The court will always exercise this power at any period before verdict to effect the ends of justice. The sound discretion of the judge regulates its exercise. * * *

As to the law in the case, counsel for appellee cited the following authorities: Brister *v.* Rutland, 683; Russell *v.* Watts, 41 Miss. 602; Irwin *v.* Hume, 50 Miss. 419; Madwell *v.* McGhee, 53 Miss. 687; Mandel *v.* McClure, 14 S. & M. 11; Fulton *v.* Woodmen, 54 Miss. 158; Vicksburg *v.* Craig, 31 Miss. 216; Winstead *v.* Davis, 40 Miss. 785; Code 1880, §§ 1124, 1683; Story on Promissory Notes, § 11; 2 Greenleaf on Evidence, § 16; Baker *v.* Byron, 2 S. & M. 193.

OPINION.—ARNOLD, J., delivered the opinion of the court:

We find nothing in the record to warrant us in disturbing the conclusion reached in this case in the lower court.

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On conflicting testimony the jury found the simple issue of fact for appellee, and construing the instructions together, we think they fairly announced the law of the case.

On the motion made by the appellant, after the testimony was closed, to exclude the evidence in regard to the indorsement of the notes, and the written contract, it was matter of discretion with the court to allow another witness to be introduced by appellee, to testify on these subjects, and to produce the notes.

If the testimony of this witness or the production of the notes suggested that further examination of appellee or any other witness was necessary or proper, application should have been made by appellant to do so. The judgment is affirmed. The motion of Clorinda Collins to dismiss the appeal as to her is overruled. The record shows no appeal from the judgment in her favor.

Affirmed.

WILEY LOTT et al. *v.* R. E. COLLINS, by Next Friend.

Judgment — Right of Counsel to Enter — Consent — Pleadings Withdrawn.

A defendant has the right to withdraw his pleadings and consent for his attorney to have judgment entered against him and his sureties, even though a motion to quash the attachment had been sustained.[1]

Same — Errors in — Value of Articles Replevied.

A judgment against sureties on a replevy bond is erroneous unless it is shown that the value of the articles replevied has been ascertained separately.

An attachment was sued out by R. E. Collins before a justice of the peace of Clark county, against the estate of Wiley Lott, *alleg-*

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The failure to appoint a guardian *ad litem* for an infant in a chancery suit for the sale of his land is not such an error as renders the decree absolutely void. Therefore it cannot be collaterally attacked. McLemore *v.* Railroad Co., 58 Miss. 514; Cocks *v.* Simmons, 57 Miss. 183.

An attorney of record may, on verbal authority from plaintiff, enter a *remittitur* of a judgment, or if plaintiff is a corporation, on verbal authority from its president. Case *v.* Hawkins, 53 Miss. 702.

A client, without the consent of his attorney, may compromise with the defendants, and dismiss his suit in an action for damages for assault and

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ing an indebtedness of $300 and property amounting to $219 was levied upon by the sheriff, and was bonded out by Lott, with Jere Saunders and W. W. Fulgham as sureties. Shortly afterward an alias attachment was sued out by R. E. Collins against said Lott, returnable to the Circuit Court of Clark county. Still later, and before the next term of the said Circuit Court, a declaration was filed, styled R. E. Collins *v.* Wiley Lott, charging that the said Lott had burned or caused to be burned a ginhouse and its contents belonging to plaintiff, to his damage in the sum of $700, and praying for judgment therefor. On the trial of the cause, the defendant pleaded "Not guilty," and a motion to quash the attachment was sustained. Several days later, and during the said term of the court, defendant Lott entered into an agreement with plaintiff, dated February 14, 1884, agreeing that the motion to quash the attachment be withdrawn, and a judgment entered in favor of plaintiff for the sum of $250 and costs of court against defendant and Jere Saunders and W. W. Fulgham, bondsmen, though no proof as to the value of the goods attached was made.

This agreed judgment was entered against defendant by his attorney under a power of attorney which he executed to W. H. Hardy, signed December 15, 1883, and filed August 20, 1884. On August 19, 1884, plaintiff dismissed his judgment against Jere Saunders and W. W. Fulgham, bondsmen, as to the costs of the court.

From the judgment for $250, defendants appeal.

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battery, and this, though he agrees in retaining the attorney not to compromise without his consent. Mosely *v.* Jamison, 71 Miss. 456, 14 So. 529.

While an attorney is not the general agent of his client in all matters that may arise in the progress of the cause or the collection of a claim intrusted to him, and cannot compromise by accepting less than the full amount due, yet he may take all steps necessary to insure collection, and has the power to control all legal process and to compromise or release an attachment or garnishment or other lien which may accrue in the progress of the cause, though as collateral thereto and not belonging to the original demand. As to these, he is not required to consult with his client at every step, or before a settlement or compromise is made. Levy *v.* Brown, 56 Miss. 83.

Where an attorney employed by a nonresident to collect a claim recovers judgment against the debtor and procures a garnishment thereon, wherein judgment is obtained against the garnishees, which judgment is afterward enjoined upon the ground that the garnishees have made a mistake in their answer admitting indebtedness, and the attorney, without further express employment, but with the knowledge and consent of the creditors, represents

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APPEALED from Circuit Court, Clark county, S. H. TERRALL, Judge.

Affirmed in part and reversed and remanded in part, February 23, 1885.

Attorneys for appellant, Woods & McIntosh.

Attorney for appellee, O. B. Collins.

Brief of Woods & McIntosh:

* * * In Rushing *v.* Rushing, 52 Miss. 332, this court held that whilst such a judgment was error that it would not reverse the case because no objection was made below. But in Thomason *v.* Wadlington, 53 Miss. 563, it held that such a judgment should be reversed notwithstanding no objection was made below.

In this case, there was no verdict of the jury at all. Nothing was submitted to the jury. There was no judgment upon the attachment by default or otherwise, nor was there any declaration filed on or before return day or any other day. The goods pretendedly attached were pretendedly condemned, and yet no declaration was filed in the suit in attachment. * * *

We think we can safely assume that the judgment in this case was void, and a mere statement of the case as hereinbefore given without argument establishes that fact. For a judgment or decree

them in the injunction suit, he has full authority to act for them therein. Levy *v.* Brown, 56 Miss. 83.

Although attorneys have no authority to take a transfer of a judgment against a third party in payment of a claim held for collection, if several years elapse without objection by the client to such a settlement, it is proper to leave to the jury, under instructions, the question whether such conduct of the client was not a ratification. Bower *v.* Henshaw, 53 Miss. 345.

The rendition of a final decree of foreclosure ordering land sold to satisfy a trust deed ends the general implied authority of the defendant's attorney of record. Without new employment or express instructions, such attorney cannot afterward bind the defendant by consenting to a sale of the land under he decree *in solido*, instead of in tracts not exceeding 160 acres, as required by law. Person *v.* Leathers, 67 Miss. 548.

The general doctrine is, that an attorney who is employed in a suit may submit the matter in dispute to arbitration, because he may do anything, by the implied consent of his client, arising from his employment in the suit, which the court may approve in the progress of the cause. But in order for

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rendered in a cause in which the court has no jurisdiction over the subject-matter is void. 5 Cush. 640; 9 S. & M. 613.

Want of jurisdiction to render a verdict may be shown collectively and avoids the judgment. Putnam v. Man, 20 A. D. 686; Ib. 179. * * *

A void judgment may be set aside and vacated at a subsequent term. Lane *v.* Wheless, 46 Miss. 666. * * *

It is not too late to raise the question of jurisdiction of the lower court over the subject-matter. We can do it here. Green *v.* Creighton, 10 S. & M. 159; Lester *v.* Harris, 41 Miss. 668.

There is no waiver in the court below, there could be none. Yallobusha *v.* Carbry, 3 S. & M. 529; Buckingham *v.* Bailey, 4 S. & M. 538; Bell *v.* Tombigbee R. Co., 4 S. & M. 549; Holloman *v.* Holloman, 4 S. & M. 550.

We ask that the case be reversed and the cause dismissed.

Brief of O. B. Collins:

The judgment of the court below should be affirmed because it is a judgment by consent. * * *

Having consented to a judgment by which the attached property should be condemned, and by which his liabilities for a much larger sum were liquidated and settled, he could not now at this late day be allowed to complain and ask this court to relieve him from the terms of a consent judgment of his own making.

Is there anything illegal in the defendant in the court below consenting that his property seized under attachment should be

him to have this implied authority, there must be a suit pending which the attorney is employed to manage. He has no such implied power where there is no suit pending, much less to change the terms of a submission agreed to by his client. Hence, if the client agree to submit to the arbitration of seven men, and the attorney agree with the other party that five shall decide the matter, the award of the five will not be binding on the client. Jenkins *v.* Gillespie, 10 S. & M. 31.

A verdict for the plaintiff, in an action of replevin, must assess the separate value of each article embraced in the finding. Whatever, in common understanding, is regarded as parts of a whole, may be assessed together — as a carriage and harness, but where the articles are clearly distinct, as carriage and harness — they must be assessed separately. Drane *v.* Hilzheim, 13 S. &. M. 336.

When several articles are embraced in the finding, the judgment should require the delivery of each separate article found for the plaintiff, or the payment of its assessed value, so that upon the delivery of any one or more

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condemned to pay a liability of his simply because that liability arises from a tort? Has he not the legal right to apply his property to just demands against him whether they arise *ex contractu* or *ex delicto?*

Was there anything illegal in his consenting to a judgment being entered up against his replevin bondsmen for the value of the attached property, they having sold the same and having pocketed the money, and having held to it with a tenacity that made the eagles squall? The value was estimated by the officers making the levy, and this by consent in the court below was taken as the value. * * *

This case should be dismissed under section 2309 of the Code of 1880, it being an appeal from a consent judgment, which is forbidden. Attorneys have power to compromise their clients' suit. Bouvier's Law Dictionary, vol. 1, p. 140, §§ 2, 6, 8; Jenkins *v.* Gillespie, 10 S. & M. 31.

OPINION.—CAMPBELL, C. J., delivered the opinion of the court:

Undoubtedly the judgment quashing the attachment was correct, but it was competent for the parties or counsel to have it put aside by consent and for the defendant to consent to a judgment against him; indeed, as he had been summoned to answer the declaration, he would have been liable to a judgment by default, if he had not pleaded, but he had pleaded, and it was admissible for him notwithstanding this to consent to a judgment, as the record shows

of the articles, the defendant would be discharged from the payment of the articles so delivered. Whitfield *v.* Whitfield, 40 Miss. 352.

In replevin by defendant of goods attached, the jury, if it finds for plaintiff, must assess the value of such goods as well as the amount due the plaintiff; a failure to do this will necessitate a reversal of the judgment. Bedon *v.* Alexander, 47 Miss. 254.

And where various articles of personal property are attached and replevied by defendant, the jury, in assessing the value of the property, should assess each article separately, as in detinue or replevin, since it is the right of the sureties to discharge a judgment *pro tanto* by surrender of a portion of the property. Code 1871, § 1448; Thomason *v.* Wadlington, 53 Miss. 560.

A judgment against the defendant in attachment in legal effect condemns to sale the property seized; and a formal recital of such condemnation is unnecessary. Sale *v.* French, 61 Miss. 170.

A verdict in replevin for different articles, which fails to separately value them, will be reversed for a writ of inquiry; but in other respects it will

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he did. The judgment against him was made proper by his consent, and his sureties on the replevy bond could not gainsay it. The judgment against Lott must stand because he consented to it. The judgment against the sureties on the replevy bond is erroneous, because there was no ascertainment of the value of the separate articles replevied, separately, so as to admit of a return of any of them.

The judgment against Saunders and Fulgham will be *reversed,* and the case remanded for the execution of a writ of inquiry to ascertain the value of the goods and a proper judgment thereon against them.

not be disturbed. Rushing *v.* Rushing, 52 Miss. 329; Ketchum *v.* Brennan, 53 Miss. 596; Spratley *v.* Kitchens, 55 Miss. 578.

And this, although defendant, who has given bond for the forthcoming of the property, suffers judgment *nil dicit.* Atkinson *v.* Foxworth, 53 Miss. 733.

And a verdict in replevin will not be set aside because the jury fails to separately value a mare and her young colt, these being so intimately connected as to be ordinarily considered as one. Henry *v.* Dillard, 68 Miss. 536.

A failure to comply with the statute vitiates the verdict. Young *v.* Pickens, 45 Miss. 553; Bedon *v.* Alexander, 47 Miss. 254.

If the value of the property be not assessed, it is error to render judgment for the whole of plaintiff's demand against the sureties. Phillips *v.* Harvey, 50 Miss. 489.

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L. & N. R. Co. *v.* JAMES THOMAS.

Memory of Witness — Inspection of Reports by Opposing Counsel.

It is not error for the court to permit the inspection of a report made by a witness, from which to refresh his memory in giving testimony, by opposing counsel, nor error to permit the cross-examination of the witness in regard thereto.[1]

Negligence — Prima Facie Evidence — Rebuttal by Use of Skill and Care.

Under section 1059, Code 1880, the *prima facie* evidence of negligence, which puts on the Railroad Company the burden of showing skill and care, "satisfactory proof" is made without an eyewitness if marks of the animal on the track and the position of its remains are shown — then if the Railroad Company introduces the engineer and fireman, who testify to reasonable skill and the exercise of due care, and that the accident was unavoidable, a verdict for the plaintiff will be set aside unless there is something in the record to discredit their testimony.[2]

James Thomas sued the L. & N. R. R. in Harrison county for the killing of two heifers of the value of $100, and obtained

1

The right of a party to cross-examine a witness, who has been introduced and examined by his antagonist, is founded on the clearest principles of reason and justice, and is rarely, if ever, denied. There is nothing in the nature of an investigation in relation to the propriety of a change of venue in a criminal case, which abridges or limits the right of cross-examination, and in such proceedings it should be allowed. Mask's Case, 32 Miss. 405.

When a witness is introduced on the stand, it is for the purpose of telling the whole truth of the matter relevant to the issue; and his whole testimony, whether given in response to interrogatories propounded by the party introducing him, or the other, is the testimony of the former. And hence the right of cross-examination, being allowed for the purpose of eliciting the whole truth from the witness, is not restricted to what the witness has testified to in his direct examination, but extends to every matter relevant to the issue. Mask's Case, 32 Miss. 405.

When a witness speaks in deposition of a fact, as within his recollection, but states he only remembers the date of it by reference to a letter written by him, which is in his possession, but does not attach the letter or a copy of it to his deposition, his answer will, nevertheless, be competent. Henderson *v.* Ilsley, 11 S. & M. 9.

A memorandum made by a witness at or near the time of a transaction for the purpose of preserving evidence thereof is admissible, though the witness cannot recall the particulars. But a memorandum made more than two years after the transaction, and after suit is brought, is inadmissible. Railroad Co. *v.* Echols, 54 Miss. 264.

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judgment in the justice court for that sum. On appeal and trial of the cause before the Circuit Court, the first resulted in a mistrial, and afterward a verdict was rendered for the amount of judgment obtained before the justice of the peace. Evidence by both plaintiff and defendant showed that the stock was killed by the passenger train of defendant; conflicting testimony as to the value of the stock was given ranging from $39 to $75. On direct examination of witness Minto, engineer for the defendant, his report was handed him from which to refresh his memory. Counsel for plaintiffs demanded an inspection of same, which was permitted, to which defendants objected, and witness was cross-examined as to contents of same, which was also objected to by defendants.

Evidence of the engineer and fireman showed that the heifers were first seen on the side of the track, about seventy yards from the train; the train was running about thirty miles an hour; that the train was supplied with all the appliances usual for the man-

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Although a witness is very old, and his memory is much impaired, if he is enabled by means of a contemporaneous written account of the occurrence about which he testifies — made and preserved by himself — to give an intelligent account of it, he should be allowed to testify, although he admits that he knows nothing of the occurrence except as his memory is refreshed by the memorandum. And such testimony is admissible, although the memorandum is not introduced, if the witness holds it and refers to it when interrogated, and testifies that he knows that he correctly noted the facts thereon. Cooper *v.* State, 59 Miss. 267.

Where a witness has never had any personal knowledge of a transaction he cannot testify from a memorandum made by another. Alabama & V. Ry. Co. *v.* Coleman, 78 Miss. 182, 28 So. 828.

In an action to recover for injuries occasioned by being struck by a train on a bridge the conductor in charge of the train may refresh his recollection from a report he made on the day of the injury, and state what time the train passed the bridge. Hasie *v.* A. & V. Ry. Co., 78 Miss. 413, 28 So. 941.

2

Railway companies are bound to the exercise of the utmost care in the transportation of passengers; but, with respect to cattle depasturing on their track, they are bound only to the exercise of reasonable care and prudence, such as a man of ordinary prudence engaged in the same business would exercise, to prevent injury to cattle. Miss. Cent. R. Co. *v.* Miller, 40 Miss. 45.

The burden of proof in such cases is on the plaintiff to show negligence. Miss. Cent. R. Co. *v.* Miller, 40 Miss. 45; N. O. J. & G. N. R. Co. *v.* Enochs, 42 Miss. 603; Memp. & Char. R. Co. *v.* Blakeney, 43 Miss. 218; Raiford *v.* Miss. Cent. R. Co., 43 Miss. 233; Memp. & Char. R. Co. *v.* Orr, 43 Miss. 279.

In an action for stock killed by a running train, proof of the injury and

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agement and stoppage of trains; that the stock came upon the track after they were seen by the crew; that the engineer did all that he could to stop the train and did slacken the speed; that it was impossible to stop the train in that distance, and the killing of the stock was inevitable.

The fifth assignment of error referred in the opinion as being not distinguished from that of Packwood *v.* C. R. Co. is as follows:

"Instructions."—"In order to relieve the defendant from liability, it is not enough for the defendant to show by the evidence that its employees in charge of its train did only some of the acts or things that were prudent and necessary to avoid the killing of the heifers, but it is necessary for defendant to show by the evidence that its employees did *all* that was reasonably necessary and prudent to prevent and avoid the killing of the heifers," and "The court instructs the jury that they are the sole judges of the weight of evidence and the credibility of witnesses, and that they may consider the manner with which a witness testifies, any bias

the value of the animals makes out a *prima facie* case of negligence under section 1059, Code 1880, section 1808, Code 1892, and it is then incumbent on the company to relieve itself of liability by showing circumstances of excuse. Railroad Co. *v.* Doggett, 67 Miss. 250, 7 So. 278.

To escape liability the company must show the circumstances of the injury and that it is exculpated. It cannot rely upon mere presumption or conjecture. Railroad Co. *v.* Hamilton, 62 Miss. 503; Railway Co. *v.* Smith, 67 Miss. 15, 7 So. 212.

The burden of showing due care is not met by proof of care in one respect only, as that a whistle was sounded at the time of the injury. Railroad Co. *v.* Dale, 61 Miss. 206.

In the absence of eyewitnesses, marks of an animal on the track and the position of its remains may make satisfactory proof that it was killed by the running of the train, which, under the statute, is *prima facie* evidence of negligence on the part of the company. Railroad Co. *v.* Packwood, 59 Miss. 280.

If the plaintiff relies solely on the statutory presumption of negligence in the running of the cars, and the defendant shows by undisputed evidence that its servants did everything possible to prevent the killing, it is proper to instruct for defendant. Bedford *v.* Railroad Co., 65 Miss. 385, 4 So. 121; Railway Co. *v.* Smith, 67 Miss. 15, 7 So. 212.

An engineer is not required to check the speed or stop the train when an animal is seen near the track, unless there is something to indicate the danger or the necessity of the animal going upon the track. Railroad Co. *v.* Brumfield, 64 Miss. 637, 1 So. 905.

Where the engineer testifies that a colt, for killing which plaintiff sues, came upon the track less than fifty feet before his engine and was not seen

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or interest a witness may have in the result of a suit, and also the probability or improbability of the evidence as compared with all the other evidence and circumstances of the case."

From a verdict and judgment for plaintiffs, this appeal is prosecuted.

APPEALED from Circuit Court, Harrison county, S. H. TERRAL, Judge.

Reversed and remanded, April 13, 1885.

Attorneys for appellant, Gaylord B. Clark, LeVert Clark, J. J. Curtis.

Attorneys for appellee, Posey & Bowers.

Brief of Clark, Clark, and Curtis:

* * * The first error assigned is that the court erred in requiring the witness Minto to surrender to the attorney for the

by him until struck, although he was at his post and on the lookout, and there is nothing to contradict his statement, a verdict should be directed for the defendant. Railroad Co. *v.* Smith, 68 Miss. 359, 8 So. 508.

Where it is shown that cows were dispersed from the track by the whistle of an approaching train, and that plaintiff's cow, separated by the track from the others, was obstructed by a parallel fence eighteen feet from the track, and after running along it for some distance, she attempted to cross the track and was struck by the train, it is for the jury, as a question of common knowledge, to determine whether the engineer, in failing to check, was guilty of negligence in not foreseeing that the natural instincts of the animal would necessarily impel it across the track to join the others. Railroad Co. *v.* Holt, 62 Miss. 170.

In such a case, although plaintiff's evidence negatives the presumption of negligence under section 1059, Code 1880, if the defendant shows facts from which negligence may be inferred, a verdict for plaintiff will not be disturbed. (Railroad Co. *v.* Packwood, 59 Miss. 280, distinguished.) Railroad Co. *v.* Holt, 62 Miss. 170.

Where plaintiff relies solely on the statutory presumption of negligence, and the defendant introduces its engineer and fireman who testify to reasonable skill and due care, and that the accident was unavoidable, and their testimony is neither improbable nor discredited, a verdict for plaintiff cannot be sustained. Railroad Co. *v.* Packwood, 59 Miss. 280.

So, in an action for killing a mule, the engineer, the only witness for defendant, testified that, when first disclosed by the headlight, the mule was standing across the track, about fifty yards ahead of his rapidly moving train, and it was then impossible to avoid the accident, and the evidence for plaintiff is merely that the tracks of the mule showed it had run forty yards down

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appellee the written report that he had made, in order that the said attorneys might use it as a basis for cross-examination. This paper was not offered nor attempted to be offered by the appellant as evidence; nor was the witness being interrogated by appellant's counsel concerning its contents. The witness merely examined the paper and report made by himself, for the purpose of refreshing his memory as to the particular time at which the train arrived at Scott Station. We do not think that the rule of law in such cases warranted the court in directing the surrender of the paper to counsel on the other side for purposes of cross-examination. * * *

The charge referred to in the third assignment of error is misleading and abstract, and requires that the jury should find for the plaintiff, if its employees did not do *all* that was necessary to prevent and avoid the killing of the stock. The fact that the engineer did all that the time and opportunity afforded him is by this charge held not to be a sufficient defense.

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the track before being struck, there is no real conflict in the evidence, and, that of the engineer being probable, the court should have instructed for the defendant. Railway Co. *v.* Tate, 70 Miss. 348, 12 So. 333.

If the uncontradicted testimony of the engineer is that he was at his post; that the animal was killed at night by a lengthy freight train, running twenty-three miles an hour; that the animal came upon the track about ten yards ahead of the engine; that the alarm was promptly sounded, and that the train could not be stopped before the collision, a peremptory instruction for defendant is proper. Railway Co. *v.* Smith, 67 Miss. 15, 7 So. 212.

Where the fireman on a locomotive running at night had opened the fire box to throw in coal, so that the light from the box "killed the light" in front of the engine, and prevented the engineer from seeing plaintiff's horses until too late to avoid injuring them, no negligence is shown authorizing recovery. Cantrell *v.* K. C. M. & B. R. Co., 24 So. 871.

A train need not be stopped nor its speed checked because animals are discovered near the track, unless there is a reasonable indication that they will go on the track. Y. & M. V. R. Co. *v.* Whittington, 74 Miss. 410, 21 So. 249.

It is a question for the jury whether there was negligence on the part of an engineer who increased the speed of his train as horses between track and a fence running parallel therewith, but finally crossing it at a cattle guard, ran ahead of the train, and crossed the track in safety, except one which was struck as it was crossing. McMillin *v.* Southern Ry. Co., 75 Miss. 490, 23 So. 182.

An engineer is not chargeable with negligence in running over and killing animals for failing to stop his train or sound the whistle when he discovers the animals at the side of the track. Y. & M. V. R. Co. *v.* Wright, 78 Miss. 125, 28 So. 806.

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The charge is also misleading and confusing because there was no evidence as to what was reasonably necessary and prudent to be done to prevent the killing.

The charge mentioned in the fifth assignment of error is abstract and misleading because it authorized the jury to disregard the testimony of defendant's witnesses, if they should believe that the said witnesses had "any bias or interest *in the result of the suit,*" when there was no evidence of a bias or any interest in the result of the suit, and because the jury were invited to pass upon the improbability of the truth of their evidence by a comparison of their evidence with other evidence in the case, when there is no other evidence which tended to suggest any improbability of the truth of the testimony of said witnesses. Railroad Co. *v.* Statham, 42 Miss. 507, 630; Railroad Co. *v.* Packwood, 59 Miss. 284. * * *

The court should have set aside the verdict on the evidence of the engineer and the fireman, who were unimpeached and uncon-

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The engineer of an engine which struck and killed two horses on a railroad testified that he saw only one, which stepped on the track immediately in front of the engine; but there was evidence of tracks on the roadbed, tending to show that the horses had stood on the track for some time, and that they could have been seen some distance away. *Held*, that it was error to give a verdict for defendant. Baird *v.* Ga. Pac. R. Co., 19 So. 661.

There being uncontradicted testimony of the engineer that he could not have stopped the train in the distance from the point where the animal could first have been seen and the point where it was killed, a judgment for plaintiff was unwarranted. M. & O. R. Co. *v.* Weems, 74 Miss. 513, 21 So. 306.

In an action against a railway company for killing a mule the engineer testified that it was running from west to east across the track while the engine was going south, so as to bring its left side toward the engine, and that it was not more than fifteen feet from the engine when it came on the track. He also stated that he did what he could to prevent the accident, but admitted that, "if he had attempted to stop his train at one hundred or one hundred and fifty yards, when he reached the one hundred and fifty yards point, he would have been running very slow." There was also testimony that there were mule tracks for nearly two hundred yards down the roadbed to where the mule lay; that there was a large hole in its right hip; and, that from the way the mule's tracks dug up the gravel in the roadbed, it was evidently "running very fast." *Held*, that it was for the jury to say whether the mule could have escaped if the engineer had exercised due caution in trying to stop the train. Scott *v.* Y. & M. V. R. Co., 72 Miss. 37, 16 So. 205.

Plaintiff proved the killing of his mule by defendant's railway train. Defendant introduced evidence to show that the accident was unavoidable. This evidence was contradicted by a witness for plaintiff, who testified that

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tradicted by any evidence of a material nature and whose testimony comported with all of the probabilities of the case.

Both of these witnesses showed that the train was supplied with all of the appliances which are usual for the management and stoppage of trains; that the stock was not seen until seventy yards from the engine; that it then came upon the track; that everything was done which could have been done to slacken the speed of the train, it being impossible to stop; that the speed was actually slackened, and that the stock was killed; that the killing was inevitable unless the stock had itself gotten off the track before the collision; that the engineer did all that he could have done, and left undone nothing which, had it been done, would have saved the stock from injury. As we have said, these witnesses are unimpeached. * * *

Brief of Posey & Bowers:

* * * The only remaining question is, whether the defendant below introduced evidence in disproof of the negligence

the mule was fastened in the trestle, and could have been seen by those in charge of the train in time to stop. *Held*, that the refusal of the trial court to grant a peremptory charge in favor of defendant was not reversible error. Southern Ry. Co. *v.* Hays, 78 Miss. 319, 28 So. 939.

In an action against a railroad company for killing stock it appeared that plaintiff found his stock dead and mangled on the defendant's right of way near a stock gap. Neither the plaintiff nor any of his witnesses saw the killing. The track was straight for a half or quarter of a mile where the stock was found, and there were tracks that indicated they had run down the railroad track along the ends of the ties for forty or fifty yards. The defendant's engineer testified that the train was a local passenger train of five coaches, well equipped in every way; that the coaches and engine were of standard pattern, and fully as good as the average passenger trains run in this country; that the brakes were of the latest improved make, and in perfect condition; that the train was running forty or forty-five an hour down grade; that he saw the stock eight hundred or one thousand feet away, and that they were on the edge of the right of way, fifty feet from the track, with their heads turned from the track; that there was no indication of their running on the track until the engine got within three hundred feet of them, when they became frightened, turned and started on a run for the track; that before they turned they were grazing; that as soon as they started for the track he immediately put on the brakes, and did all he could to stop the train, but could not do so in time to prevent striking them; that with a train of that character, running at that rate of speed, it could not be stopped in less than one thousand three hundred or one thousand four hundred feet; and that he could not have prevented the killing of the stock. *Held*, sufficient to require a peremptory charge for defendant. A. & V. R. Co. *v.* Boyles, 37 So. 498.

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presumed by law, which was uncontradicted by any other facts, and was so reasonably probable, and obviously true and credible, as to satisfy this court that the jury capriciously and wantonly disregarded evidence which they probably believed to be true. This is the principle declared in the case of Packwood *v.* Railroad Co., 59 Miss. 280. The evidence for the Railroad Co. in that case was overwhelming. It was uncontradicted, and there was no conflict of evidence and no question of the credibility of witnesses. One of the main facts in the case — that the animal was killed on a dark and foggy night — was easily disproved if untrue, for many witnesses might have been easily found who could testify to the fact, if untrue. No case like the Packwood case has been before this court, or will probably be again. Numerous other cases in which the verdicts have been contrary to the evidence of the engineer and fireman have been upheld, and distinguished from the Packwood case by the important difference that there was conflict in the evidence, either from direct or circumstantial evidence, or because the evidence of these employees was improbable, or otherwise doubtful. Notably in the case of Toulme *v.* N. O. R. Co., 59 Miss. 284. In that case the only positive evidence, by eyewitnesses, was by the engineer and fireman. Both swore that the horse was not struck by the locomotive or cars at all; that the horse ran ahead of these and escaped, but had caught his foot in a water gap and broke his leg and tore off his hoof. It was in broad daylight; they had abundant opportunities to see what occurred; they said their attention was specially directed to the horse and the occurrence. Their testimony was positive, and, if believed, was conclusive. They had the usual advantage in testifying, of being the only eyewitnesses of the transaction, but the jury disbelieved them and this court approved the verdict. Some circumstantial evidence alone discredited their testimony. It was, that the horse had been struck by the locomotive and dragged along the track. This was shown by evidence of the marks on the ground where the horse was dragged, and the blood stains of the horse along the track. Upon this slight evidence, the positive evidence of the witnesses for the railroad was discredited.

In the case at bar, there is conflict in the evidence, and there is much reason for discrediting the testimony of the engineer. Besides this, the evidence of these witnesses, if believed, does not clearly establish the defense — disprove negligence. * * *

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OPINION.—ARNOLD, J., delivered the opinion of the court:

The verdict is not supported by the evidence in this respect; the case is not distinguished from that of the Chicago R. Co. *v.* Packwood, 59 Miss. 280. It was not error for the court to permit counsel for appellee to inspect the written report placed in the hands of the appellant's witness, Minto, and used by him to refresh his memory, nor was there any error in permitting appellee's counsel to cross-examine the witness on this report. 1 Greenleaf on Evidence, § 437; 1 Wharton on Evidence, § 525.

It is not necessary to consider other errors assigned, and the judgment is

Reversed and the case remanded.

C. R. BEAL *v.* ALFRED SHARP.

Code of 1880, Section 460, Treasurer's Commissions Under.

Section 460 of the Code of 1880 fixes the county treasurer's commissions at two and a half per centum on sums received. He is not entitled, under this section, to commissions on money collected by the sheriff the last month of his term not paid over to him but paid to his successor after he has qualified.[1]

Declaration — Demurrer, Proper Judgment when Sustained.

When a declaration, on its face, shows no cause of action and there is no application to amend after a demurrer to it has been sustained judgment should be rendered for defendant.[2]

Appellant, Beal, brought this suit in a justice of the peace court against appellee, Sharp, to recover the sum of $123. From a verdict and judgment for plaintiff defendant appealed to the Cir-

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1

A county treasurer's commissions should be estimated on the basis of the political year, beginning the 1st of January and ending the 31st of December, and not on the basis of the fiscal year, beginning the 1st of October and ending the 30th of September. Adams *v.* Coker, 85 Miss. 222, 37 So. 744.

2

If plaintiff does not, during the term, obtain leave to amend, a judgment sustaining a demurrer to a declaration, though not expressing that the action is dismissed, is final and may be appealed from. Jacobs *v.* Insurance Co., 71 Miss. 656, 15 So. 639.

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cuit Court. Plaintiff began his action on an account and declaration. The declaration avers that plaintiff was treasurer of Lawrence county for the term ending on the first Monday of January, 1884, and the defendant succeeded him in office; that the sheriff of the county collected $4,946.69 county taxes in the month of December, 1883, but failed to pay it over to plaintiff and paid it over to defendant after he went into office; that the treasurer's commissions on it was $123, which plaintiff was entitled to receive and for which he sues.

Defendant demurred to this declaration, assigning the following cause: The facts stated show that plaintiff never received, kept, or paid out the funds and, therefore, he was not entitled to the commissions sued for and the tax collector had no authority to pay plaintiff or any one for him, at the time the money was paid, and it was defendant's duty to receive and keep the commissions. The demurrer was sustained. There was no application to amend and final judgment was rendered for defendant. Plaintiff appeals.

APPEALED from Circuit Court, Lawrence county, A. G. MAYERS, Judge.

Affirmed, March 1, 1886.

Attorney for appellant, A. H. Longino.

Attorney for appellee, R. H. Thompson.

Brief of A. H. Longino:

The action for money had and received is in the nature of a bill in equity and equal and exact justice should be done by it. Rawlings *v.* Poindexter, 14 S. & M. 66.

Apply the doctrine to the case at bar, and the demurrer should have been overruled. * * *

Simply because appellee "received," in the language of the statute, said December collection of taxes, it will not do to say he was entitled to the treasurer's commissions thereon; for such construction is clearly contrary to the intendment of the statute.

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If the tax collector had made his settlement with the treasurer (as the law *commanded* him to do), on the 1st day of January, 1884, of course appellant would have been entitled to, and have received the commissions claimed. The law, then, presumes that the tax collector discharged his duty, and did that which it said he should have done in the premises, and hence, by intendment of the statute, appellant is entitled to the commissions claimed; and that it was not intended by the statute that appellee should have said commissions is clear from section 460 of the Code, which says the treasurer shall receive 2½ per cent. on all money received by him for county purposes, "except what he may receive from his predecessor in office."

When appellee received said commissions, he did so for the use and benefit of appellant. And the action for money had and received will lie in all cases where the defendant has come into possession of plaintiff's property by permission of law. Glass *v.* Lobdell, 1 Walk. 107. * * *

Brief of R. H. Thompson:

* * * While no declaration in the cause was necessary, yet the plaintiff, having elected to file one, must stand or fall by it. If he elects to plead in writing he must file good pleadings.

Regard it as you may, the declaration is the plaintiff's own elected written statement of his cause of action, and the defendant was entitled to invoke the judgment of the court as to its legal sufficiency. * * *

The demurrer is because "the facts stated show that plaintiff never received, kept, or paid out the said county funds and that he was and is not entitled to the commissions sued for, and because the tax collector had no authority to pay plaintiff or any one for him (at time money was paid to defendant) and it was defendant's duty to receive and keep the county's funds."

Compensation is paid to county treasurers only for receiving, keeping, and disbursing the funds. The treasurer's compensation is fixed by law at 2½ per cent. on sums received (§ 460, Code 1880), provided * * * he does not receive more than $1,000.

The declaration shows that Mr. Beal did not receive the money paid Sharp and, if he did not do so, he was not entitled to commissions on it. His fees are fixed by law. Besides the declaration does not show but that plaintiff had already received $1,000 in the year 1883. * * *

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Sharp could not pay the county's money to Beal or any part of it under section 374, Code 1880, except upon a county warrant, or an allowance of a court.

Sharp was himself not entitled to commissions until he settled with the county. He could not say that any particular money was his of said funds.

To maintain this suit would be to interfere with the revenue system of the county and to intermeddle with its official accounts. * * *

OPINION.— ARNOLD, J., delivered the opinion of the court:

The judgment below is correct. The declaration showed no cause of action, and there was no application to amend after the demurrer had been sustained. Appellant was not entitled to recover, because the money on which he claims commissions as county treasurer was not received by him, but was paid after the expiration of his term to his successor in office. Receipt of the money by appellant, during his term of office, was a condition precedent to his right to commissions on the same.

Affirmed.

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ANNIE E. KIESTLER, by Guardians, Etc. v. VICKSBURG & MERIDIAN RAILROAD CO.

Ejectment — Peremptory Instruction — When Improper.

In an action of ejectment where only part of the land sued for is claimed by the defendant and there is a dispute as to the boundaries and there is a material conflict in the evidence it is error to give a peremptory instruction to find for the defendant.[1]

Deeds — Effect of Reference to Map in Description of the Land Conveyed.

It is error to assume that a map, referred to in the descriptive part of a deed merely to state that the lot conveyed was not numbered therein, was to govern as to boundaries.[2]

Ejectment by appellant, Kiestler, against appellee, the Vicksburg and Meridian Railroad Company. From verdict and judgment for defendant plaintiff appeals.

The land claimed by plaintiff was described as follows: "Bounded on the north by southern boundary of Owen Rhode survey, or lot 10 of said survey; on the east by Levee street continued through the surveys of Owen Rhode and F. Steigleman and J. W. Walker, and on the west by Front Levee street on the river, being the same lot on which J. W. Conklin resided, extending from said Levee street extended to Front Levee street on the

1

A peremptory instruction is proper only where all the facts in evidence taken as true, with every just inference from them, fail to maintain the issue Whitney *v.* Cook, 53 Miss. 551.

And if there is any conflict in the evidence, the view which is most favorable to the party against whom the instruction is asked must be taken as true. Carson *v.* Leathers, 57 Miss. 650.

Where there is a material conflict of evidence, a peremptory instruction should not be given. Richardson *v.* Tolliver, 71 Miss. 966; Thrasher *v.* Gillespie, 52 Miss. 840; Cantrell *v.* Railroad Co., 69 Miss. 435, 10 So. 580; Timberlake *v.* Compress Co., 72 Miss. 323, 16 So. 530.

Peremptory instruction to find a certain way is improper unless the court, on the evidence, would set aside a contrary verdict. Bernheim *v.* Dibrell, 66 Miss. 199, 5 So. 693; Holmes *v.* Simon, 71 Miss. 246, 15 So. 70.

When the evidence is sufficient to warrant a verdict for a party in any view of it which may be legally taken, a peremptory instruction in favor of his opponent should not be given. Railroad Co. *v.* Boehms, 70 Miss. 11, 12 So. 23; Holmes *v.* Simon, 71 Miss. 245, 15 So. 70; Tribbette *v.* Railroad Co., 71 Miss. 212, 13 So. 899; Rhymes *v.* Jackson, etc., Co., 85 Miss. 140, 37 So. 708.

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river through from street to street, said lot of land not being numbered on the map of Vicksburg but marked down as F. Steigleman. In the city of Vicksburg, Warren county, Mississippi." The defendant in its plea only defended for so much as lies west of the east line of Front street. Plaintiff contended that their lot extended back to the river and that what was at one time Front street had caved into the river, and as the railroad was built along the bank of the river it was necessarily on her land. Defendant contended that the western line of the lot is the eastern line of Front Levee street, as shown on Winn's map of the city of Vicksburg, which, it contends, is east of where the railroad track was built. The evidence shows that the property was sold by one Bobb to Christian Frank who afterward married F. Steigleman, and they conveyed to J. W. and A. J. Conklin and plaintiffs claim as heirs of Conklin. The deed from Steigleman and wife to the Conklins describes the land as bounded on the east by Levee street, on the north by Rhode survey, or lot No. 10 of that survey, and on the west by Front Levee street, on the river; and it recites that it is the same lot on which J. W. Conklin then resided and that it was not numbered on the map of the city, but marked as F. Steigleman. Parol testimony was introduced by plaintiff to the effect that at the date of this deed J. W. and A. J. Conklin were renting a small house on the land which they occupied as a store; that in front of this house and on the river bank was a road used by the public; that A. J. Conklin directed the drawing of the deed

In granting a peremptory instruction, the court assumes as true all testimony tending to establish the issue in favor of the losing party. Tribbette *v.* Railroad Co., 71 Miss. 212, 13 So. 899.

It is only in cases free from doubt that the court will withdraw a case from the jury; but where it is plain that a verdict for plaintiff would not be permitted to stand on the facts proved, assuming the truth of the testimony and giving full effect to every just inference from it, the court should exclude the evidence or instruct for the defendant. Railroad Co. *v.* Doyle, 60 Miss. 977.

2

A plot of the survey of land ought not to be admitted in evidence upon the mere certificate of the surveyor who made it, unless the survey were made under an order of court, or in pursuance of the statute for establishing private boundaries. Carmichael *v.* Trustees of School Land, 3 How. 84.

A plot and certificate of survey made in pursuance of an order of court, if they show generally the metes and bounds of the *locus in quo*, may be introduced in evidence, though they do not show the parcels or lots of which the tract is composed. Spears *v.* Burton, 31 Miss. 547.

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and what was intended by Front Levee street on the river was this road; that this street had caved into the river before the building of defendant's railroad, and that the rails are now laid on the site of the house they occupied which was destroyed by fire. The deed to the Conklins was made in 1859 and they continued to occupy the house until it was destroyed by fire; that the road was built in 1872 and Conklin protested against the building of it on the land. Defendant introduced Winn's map of the city of Vicksburg, admitted to have been the city map in 1859, when the deed was made to the Conklins, and the sworn statements of two surveyors who stated that they surveyed the ground and found the southwest corner of Rhode survey as laid down on Winn's map to be east of the location of defendant's road, and that the east line of Front Levee street, shown on the map, was twenty-seven feet east of the railroad track. The court gave a peremptory instruction to find for defendant. From verdict and judgment in accordance therewith plaintiff appeals.

APPEALED from Circuit Court, Warren county, RALPH NORTH, Judge.

Reversed and remanded, April 26, 1886.

Attorneys for appellant, Shelton & Crutcher.

Attorney for appellee, W. L. Nugent.

Brief of Shelton & Crutcher:

The theory of defendant and that on which the court below seems to have acted is this:

That the city map shows Front Levee street west of the property in question, and the undisputed statement of the surveyors shows the east line of that street to be twenty-seven feet east of the location of the railroad track, and the deed from Rhode administrator shows that lot No. 10 did not reach the river. Therefore, since the deed to Conklin refers to the city map to identify and locate the property, and to lot No. 10 as its northern boundary, and since the Walker's survey bounds it on the south, plaintiff is conclusively estopped to claim further west than where Polk's survey shows the east line of the street, shown on the map to be.

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* * * Nor can plaintiff be estopped by anything shown by the Walker survey. No reference to this survey is made in the deed. * * *

Nor can plaintiff be estopped by the suggestion that no southern boundary for her lot can be found without referring to the Walker survey, and without such boundary the property could not be identified. The fact that a southern boundary only can be found in the Walker survey does not compel plaintiff to draw in her western boundary to correspond with the western boundary of Walker's survey, unless her deed so limited it.

The description of the lot as that on which J. W. Conklin resided affords sufficient data from which to establish the limits without referring to Walker's survey. * * *

Admitting that such would be the case under ordinary circumstances, it cannot be so here for the plain reason that the admission of defendant that the property had never been laid out into lots and squares, and that no street had ever been created, dedicated, or condemned west of it, estops defendant to insist that there was a street there. And if he cannot insist that there was, he cannot insist that such street was the western boundary of the lot sold to Conklin, and that the eastern line of that street is east of the railroad track.

Having made this admission defendant cannot insist, in this case, on the existence of a street at that point. And if he cannot, all his testimony as to the location of the east line of that street is out of the case.

In Morgan & Harrison *v.* Reading, 3 S. & M. 396, the court says: "When parties to a suit agree upon the facts of a case and, for the purpose of using the agreement as evidence, reduce it to writing, they were concluded thereby, and no evidence to vary or contradict it can be admitted."

The map was competent evidence for certain purposes, but could not be used to controvert a fact conceded by this admission.

Suppose, then, plaintiff was estopped by this reference to the map, defendant's admission estops him to insist on that estoppel. Estoppel against estoppel sets the matter at large. Bigelow on Estoppel, 293. * * *

Some of the rules governing in the construction of deeds are these: That the parties were supposed to contract with reference to the property as it stood at the date of the deed, and, therefore,

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resort is had to these circumstances in explanation of their meaning. Martindale on Conveyancing, § 99.

The construction most favorable to the purpose of the deed must prevail. Martindale, § 100.

We, therefore, submit that the court erred in giving the instruction, because, upon the evidence, the plaintiff was entitled to a verdict.

And, certainly, she was entitled to have a jury pass upon the issues presented by the evidence in the case.

Brief of W. L. Nugent:

* * * There would seem, therefore, to be no difficulty in the case whatever. The only tangible evidence to identify the calls of the deed under which the appellant claims is *the Winn map and the testimony of Polk and Dabney, competent engineers. These clearly show that the defendant was entitled to verdict and judgment. The plaintiffs were bound by the calls of their deed, and they are thereby estopped to claim that there was no such street as Front Levee. Their conveyance was made with reference to Winn's map of the city, and the existence of the street bounding their property on the west.*

The testimony of the appellants was wholly negative. Indeed, their witnesses seemed to be wholly ignorant on the subject of the Front Levee street. It devolved upon them to show that the *street* was improperly laid out, and, therefore, transgressed their boundary; but no such attempt was made. The court very properly put an end to the litigation by giving a peremptory charge to find for the defendant.

We hardly think there can be any controversy as to the dedication of Front Levee street. The maps and plats, and the very conveyance under which appellants claim, recognize its existence. Vick *v.* Vicksburg, 1 How. (Miss.) 379; Railroad Co. *v.* Mize, 39 Miss. 374; Gardner *v.* Tinsdale, 60 Am. Dec. 407, 422; Stacy *v.* Miller, 55 Am. Dec. 112; Valentine *v.* Barton, 33 Am. Dec. 711; Washburn on Equity, 195 *et seq.;* 59 Miss. 570; 3 Washburn on Real Property, 93; 18 Mich. 56; 1 Hill, 189; 5 Md. 314; 19 Wem. 128.

OPINION.— CAMPBELL, J., delivered the opinion of the court:

It should have been left to the jury to find where the boundary of the lot was. It was not correct to assume that the "Winn

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map" was to govern as to the boundaries. It is true that this may was mentioned in the deed made by Steigleman, but only to state that the lot was not numbered on said map, and the deed describes the land conveyed as bounded "on the north by the southern boundary of Owen Rhode survey, or Lot 10 of said survey." This survey was of record, and a map of it shows the Mississippi river as its western boundary. The deed also describes the lot conveyed as that "on which J. W. Conklin now resides," and there is testimony that the railroad is on the site of the house then occupied by Conklin.

In view of the dispute as to boundary, and the conflicting evidence, the case should not have been withdrawn from the jury.

Reversed and remanded for a new trial.

A. BARNETT *v.* MASON WEDGEWORTH et al.

Tenant — Purchase of Tax Title — Estoppel.

A tenant in possession of land owned by minor heirs is estopped from purchasing same when sold for taxes, such a purchase being held to enure to the benefit of the heirs.[1]

Accounting — Set-Off — Mesne Profits.

An owner in an action brought for reclamation of land cannot be deprived of the right to invoke sums due for mesne profits, in a final accounting before a commissioner.[2]

Pleadings — Errors in, Corrected.

Where the face of the pleadings shows errors in computation, such errors will be corrected by the appellate court, though no exceptions were taken thereto in the court below.[3]

Taxes — Proof of Payment.

In a final accounting before a commissioner, taxes paid by a defendant upon land held by him as tenant will not be allowed, in the absence of proof that such taxes were actually paid, the mere fact of the assessment of such taxes being not sufficient.[4]

1

A tenant having entered and remained in possession cannot set up as against the landlord's demand for rent an adverse title in his wife. Love *v.* Law, 57 Miss. 596.

A tenant cannot dispute that the landlord's title was good when he entered; yet he may show that it afterward vested in another, and his attornment to such other is good. Rhyne *v.* Guevara, 67 Miss. 139.

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Statement of the Case.

This is a suit in the Chancery Court of Sunflower county for redemption of land by heirs of James Wedgeworth, who died intestate in the year 1866. The tract of land in controversy was sold to the State in 1867 for taxes, and in 1868 defendant leased said land for a term of fifteen years from the attorney of James Wedgeworth and went into possession of same. Plaintiffs charged that said lease was void in that it had never been acknowledged, which was admitted in the answer of defendant. In 1870 H. S. Allen bought the land from the State, paying $5.02, the amount of taxes for which the land was sold, and on March 6, 1871, defendant purchased of H. S. Allen the said land, paying therefor $5. Plaintiffs were the only heirs-at-law of said James Wedgeworth, and were both minors at the time of the sale of the land to the State, and Mason Wedgeworth only became of age in 1881, at which time Jane Wedgeworth was still a minor. They filed this bill for a reclamation of property, and a just accounting between parties, and on the hearing thereof the bill was sustained, and a commission appointed to state an account. Defendant claimed a credit for taxes paid upon the land while he was in possession, which was

Although a tenant cannot set up a claim to the leased land adverse to the title of the possessor, and having entered for a term of years, cannot make his possession adverse to that of the lessor, yet, when he claims under an absolute deed for the term, and the question is as to his right to hold under this deed, he may rely on the Statute of Limitations. Brown *v.* Issaquena Co., 54 Miss. 230. (Benson *v.* Stewart, 30 Miss. 49, distinguished.)

Hence, where an attempt is to oust a tenant upon the allegation that he never had a lease, and the question is as to whether such a lease ever existed, he may rely upon his possession, not as adverse to his landlord's title in fee, but really in subordination to this, however adverse to the landlord's claim to immediate possession. Brown *v.* Issaquena Co., 54 Miss. 230; Jones *v.* Madison County, 72 Miss. 777, 18 So. 87.

A tenant of land may during his tenancy acquire a title adverse to that of his landlord, and after expiration of his term and surrender of possession may recover upon it. Rives *v.* Nesmith, 64 Miss. 807, 2 So. 174.

Adverse possession on the part of a tenant begins to run from the time when the landlord has notice of his adverse claim, and it is unnecessary that the tenant first vacate the premises. Greenwood *v.* Moore, 30 So. 609.

One who enters on land as the tenant of a grantee of a dower interest, and agrees to redeem the lands from a prior tax sale to the State, cannot acquire title by purchase from the State, but such purchase becomes a redemption in favor of his landlord. Lyebrook *v.* Hall, 73 Miss. 509, 19 So. 348.

A tenant coming into possession of land subsequent to its sale for taxes is not precluded from buying the paramount title from the State. Walker *v.* Harrison, 75 Miss. 665, 23 So. 392.

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disallowed by the chancellor on final decree. From which this appeal was prosecuted.

APPEALED from Chancery Court, Sunflower county, W. G. PHELPS, Chancellor.

Affirmed, set aside and revised, and decree here, November 18, 1884.

Attorneys for appellant, Nugent & McWillie.

Attorneys for appellee, Calhoon & Green.

Brief of Nugent & McWillie:

* * *. It was improper to charge the defendant with rents either for the purpose of thereby effecting a redemption or awarding the complainant a recovery over for the balance in his favor. The right of the complainants to redeem was derived exclusively from the statute, and could be asserted only in the mode and under the condition prescribed by the statute. The statute re-

A tenant in possession of land cannot buy at a tax sale, so as to obtain title as against his landlord. Walker *v.* Harrison, 75 Miss. 665, 23 So. 392.

2

Chancery has jurisdiction, at the suit of one who is *non compos mentis*, to recover from a disseizor rents and profits of land. Robinson *v.* Burritt, 66 Miss. 356, 6 So. 206.

Infant owners of land by legal or equitable title may, in chancery, charge as trustee one who has received rents and profits of their lands. Johns *v.* Williams, 66 Miss. 350, 6 So. 207; Wathen *v.* Glass, 54 Miss. 382.

Where the real owner of land seeks to recover same from one lawfully in possession, though under a defective title, he will be required to pay for permanent improvements made by the possessor in good faith with a belief of title in himself. In a proper case, the person making the improvements may resort to equity as complainant and obtain a decree for the value of the improvements. Hughes *v.* Stallings, 52 Miss. 375.

The commissioner also should ascertain and report the value of all permanent improvements as they exist at the time of stating the account, but the rent should not be increased on account of the same. Staton *v.* Bryant, 55 Miss. 261.

The accounting in this case between the complainants and the defendant in possession, as to rents, improvements, taxes, etc., examined, and on all proofs the result is not disturbed. (Staton *v.* Bryant, 55 Miss. 261, distinguished.) Massey *v.* Womble, 69 Miss. 347, 11 So. 188.

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quires that the owner shall "pay" the taxes, damages, and value of permanent improvements, and we can make no exception to this provision, disadvantageous to the purchaser, whether he had realized rent from the land or not. The proceeding is not a suit for the rent, and if not the view most favorable for appellees, it is treated as a proceeding to redeem, the conditions of the statute authorizing a redemption must be complied with. Code 1857, p. 81; Cooley on Taxation, 364; Craig *v.* Flanagan, 21 Ark. 319; Hilliard on Tax Titles, 433.

Rents and profits received by the tax purchaser cannot be applied by way of equitable redemption. Spengin *v.* Torry, 37 Iowa, 242.

In the case at bar the land was held by the State for unpaid taxes at the time of defendant's entry. And it was the State's title there held that he acquired by purchase from Allen some two years afterward. The deed from the State to Allen of May 31, 1870, and Allen's deed to him made some months later were both regularly recorded. The lease of August, 1868, is alleged to be void, and the records shew that no rent was paid by appellant, and that he was claiming under an adverse title outstanding at the time of entry, and which he had acquired by purchase and caused to be spread on the public records.

Where, to ascertain the amount due on a mortgage to which a fraudulent vendee of the land is substituted, an account is taken, he should not be charged with increased rent by reason of improvements made by him and for which compensation is denied. Phillips *v.* Chamberlain, 61 Miss. 740.

While an administrator and his confederate, who hold under a collusive and fraudulent sale made by the former, cannot be allowed for improvements put on the land, they should not be charged with increased rents because of such improvements. They are entitled to credit for taxes paid, although irregularly assessed and levied. Sivley *v.* Summers, 57 Miss. 712.

Assumpsit for the use and occupation, where land is held adversely, is not maintainable; trespass for mesne profits is the proper remedy. Dean *v.* Tucker, 58 Miss. 487.

Six years is the period fixed by the Statute of Limitations within which to bring an action for mesne profits on land held adversely. Dean *v.* Tucker, 58 Miss. 487; Lindenmyer *v.* Gunst, 70 Miss. 693, 13 So. 252.

In an action for the recovery of mesne profits where land is held adversely, plaintiff's recovery extends to the time of the trial. Dean *v.* Tucker, 58 Miss. 487.

If a tenant from year to year, upon the death of the landlord, assert title in himself, and refuses to surrender at the end of the year, or to longer pay rent, the heirs who recover in ejectment are entitled to charge him thereafter

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The prayer of the bill is for the cancellation of his title so acquired. The first decree does not direct cancellation, but declares appellees entitled to redeem and refers to a commissioner the statement of amount necessary to be paid in order to effect redemption. The decree directs the commissioner to report as to the taxes and improvements and as to amount of profits and rents *received by appellant* from and on account of the property. The land is only thirty-four acres in area, *and there is nothing in the record to show that he ever received any rent from it.* The commissioner does not report what was received as directed by the decree, but files the rent, as before stated, with reference to the void lease for fifteen years and after that at what he estimates as the rental value. The report, notwithstanding it, did not follow the decree and, notwithstanding the manifest errors before indicated in calculation of rents, was confirmed by the court, and the several deeds, before mentioned, declared void and a writ of habere facias possessionem awarded.

At the time the bill was filed the fifteen years from date of lease had not expired, and the lease was alleged to be void, yet on a bill to remove cloud on title the several deeds were canceled, and writ of habere facias possessionem awarded, and in connection with the declaration of complainant's right to redeem, the defend-

with the reasonable rental value, regardless of the former contract price. Thomas *v.* Thomas, 69 Miss. 564, 13 So. 666.

3

But exceptions to a report which is erroneous in point of law, or which violates the directions upon which it is ordered, are unnecessary. Such a report may be attacked for the first time, on motion for confirmation, or on appeal. Fowler *v.* Payne, 52 Miss. 210.

Where, in stating an account, the commissioner has made a wrong computation of interest, objection can be made in the Supreme Court as to the amount required to be paid by the decree, though no exceptions were filed in the court below. Brooks *v.* Robinson, 54 Miss. 272.

4

The receipt prescribed by the statute is the only competent evidence to prove payment of taxes; but if such receipt be obtained and it be lost or incapable of production, proof to supply it may be made. Edmondson *v.* Ingram, 68 Miss. 32, 8 So. 257.

This section was never meant to exclude parol evidence to show the land actually paid on where the same was inaccurately described in a statutory receipt; it simply means that the prescribed receipt is the only valid one in favor of the tax collector, on his settlements. (Edmondson *v.* Ingram, 68 Miss. 32, overruled.) Perret *v.* Borries, 78 Miss. 934, 30 So. 59.

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ant was made chargeable with rents during his occupancy. If the defendant was still tenant to complainants, they could not maintain their bill; certainly the writ of assistance ought not to have been granted them. If he was not tenant, they were not entitled to rents. He could not well be both tenant and trespasser, so as to warrant the decree. But not only is the decree erroneous in the manner in which it provides for redemption, but it is erroneous in granting the right to redeem on any terms. The statute (Rev. Code 1857, page 81) provides how persons under disability may effect a redemption of lands sold for taxes on attaining their majority, or previous thereto, and no special reason being shown for a departure from that mode and the equitable interposition of the court, we feel justified in assuming that the court below was without authority to decree a redemption by the appellees. The bill alleges that appellees had offered to pay the amount allowed appellant by law for taxes, damages, and permanent improvements *after deducting* the amount of rents and profits received by him. Payment to the clerk is what was required by the statute, and this they could certainly have made without reference to the wishes of appellant. Not only was the payment not made, but the tender even was not effectual, for they did not make a tender of the full amount required by the statute. They could not impose a condition not authorized by the statute, or reduce on account of the supposed rents, or any other account, the full amount of taxes, damages, and improvements. *No inability to pay is alleged or shown,* and no feature of a special contract between the parties is indicated, to bring this case within the class where the interposition of a court of equity has been sanctioned.

It has been held generally that redemption cannot be had in equity. Mitchell *v.* Green, 10 Metc. 101.

We submit therefore: (1) That the court below could not decree a redemption on the case made, and if mistaken in this, then (2) that its decree charging appellant with rents was erroneous, and, if still mistaken, we insist (3) that it was error to confirm the grossly erroneous report of those rents.

Brief of Calhoon & Green:

1. A tenant cannot dispute his landlord's title, even though the lease be void. Heath *v.* Williams, 25 Me. 209; King *v.* Murray, 6 Ired. (N. C.) 62; Byrne *v.* Beeson, 1 Doug. (Mich.) 179.

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2. A tenant cannot buy in and claim under a supervening tax title against his landlord. Such purchase inures to his landlord. It was his business to pay the taxes under his lease, for it provided for ultimate sale to him, in fact, if valid, *was* a conditional sale *in futuro*.

3. The act of the court complained of, in remanding to rules, was, if an error, quite immaterial and of no hurt to Barnett. It simply postponed the evil hour, as the case then stood, and without remanding, complainants were entitled to a decree in their favor.

All these principles are too familiar to require citation of authority to support them, and, if they were *res nova*, they are too plainly right to need bolstering by argumentation.

4. The demurrer was to the whole bill, and, in any case, there should be affirmance of the decree as to the cancellation. The bill is not to remove clouds only. It must be noted that the law required complainant to tender the amount of taxes paid. Here it was folly to do so, for the defendant owed them for rent or for the reasonable value of the use and occupancy of the land, and so the bill avers, not a tender of money but an offer to account by crediting the taxes on the claim for use and occupation or rent, and a refusal of the offer by defendant. Hence an account was necessary, and the court thus drew to itself full jurisdiction to determine everything under the prayer for general relief, properly took the account, which defendant never excepted to, annulled the pretended tax title, made void any claim of tenancy, and restored the land.

OPINION.— CHALMERS, J., delivered the opinion of the court:

Complainants (appellees) had restitution of their land, upon satisfactory proof made that it was bought for taxes by the defendant at a time when he was disabled to buy a tax title thereto, he being, at the time, in possession as the tenant of their father, now dead, whose property it then was. They did not pay, nor offer to pay, in money the amount of taxes paid out and damages thereon; but asked that an account be taken and that the amount found due defendant for these things should be set off against the large sum due themselves by him for mesne profits. The account was taken by a master and he was found largely indebted to them for rents and profits of the land while in his possession, which account was confirmed by the chancellor. The one was adjudged and decreed

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to be an offset against the other. It is insisted, upon appeal, that sums due for mesne profits cannot be invoked as an offset against sums expended in paying taxes, but that these latter must always be paid in money, even though the defendant may owe a much larger sum for rents.

No authority is found for this position, but even if true, it would not affect this case. If defendant was a tenant in possession of the land, he was disabled to buy, and his purchase inured to them. His pretended purchase was in law theirs, so they have always been the lawful owner. Surely an owner can always reclaim his own by accounting at the final decree for anything that is a lawful charge upon it, and cannot be deprived of the right of offset, even in redemption proceedings when, as here, the debt due him is the direct product of the land in controversy. This, however, is not solely an application to redeem, but a reclamation of their own by complainants, upon which equity will fasten a lien for all proper charges. The bill could be maintained regardless of the statutes in reference to a repayment of all taxes expended in the acquisition of the land. These taxes defendant actually got so far as proved, and it was not incumbent upon complainants to pay them or offer to refund them in their original bill.

We cannot notice errors assigned with reference to alleged mistakes in stating the accounts, since no exceptions were filed to the report of the commissioners in the lower court.

ON SUGGESTION OF ERROR.

OPINION.— CHALMERS, J., delivered the opinion of the court:

This case stands on suggestion of error. In our former opinion we held that no notice could be taken here of alleged errors in the commissioners' report because no exceptions had been filed thereto in the court below.

We failed to note that the errors in computation were shown by the face of the pleadings, and that, therefore, no exceptions were necessary in the court below. The errors are to be corrected here. Brooks *v.* Robinson, 54 Miss. 279.

Appellant should have been credited by $150 more than he was. He is not entitled to any credit for any taxes paid by him during the time he held the land. The bare fact that such taxes were assessed is not enough, unless he has shown that in fact he paid

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them, which he has not done, though duly cited to appear before the commissioners.

The decree will be corrected by increasing the amount of his credit by the sum of $150, and, as thus amended, will stand *affirmed.*

Let the cost be divided.

CHARLES BARNETT *v.* WILEY B. STEWART et al.

Sureties — Liability.

Sureties on a bond cannot be held liable for moneys collected by executors out of property coming into their hands in their fiduciary capacity from a source other than that of the estate of the testator. In such case proper applications of proceeds from sale of land required by bond under Act of 1820.[1]

Codicil — Notes Due Testator — Advancement.

A codicil to a will recites "That all notes on each of my sons and sons-in-law of which I may die possessed, shall be deducted from the monies accruing to them or to their children." *Held,* as against minor heirs of a legatee whose husband was indebted to the estate in a large sum, said amount being construed as an advance to the legatee under the will.[2]

Executors — Personal Liability — Separate Estate.

Executors of an estate of a testator who intermeddle with a separate estate of the wife of the testator may be held personally liable to the distributees of the latter estate, but this does not fix a responsibility on them as executors, where the property thus taken over by them was divided among those claiming to be entitled thereto.

Same.

A fortiori, they are liable *in personam* for a distribution of property to a person not entitled to receive it.

1

The execution of a bond to account for the proceeds of the sale, when required by the statute, is essential to the validity of the sale. Currie *v.* Stewart, 4 Cush. 646; Hamilton *v.* Lockhart, 41 Miss. 460; Washington *v.* McCaughan, 34 Miss. 304; Rucker *v.* Dyer, 44 Miss. 591.

And the rule is the same, where the sheriff is appointed administrator *virtute officii.* Rucker *v.* Dyer, 44 Miss. 591.

The fact that a county administrator has given bond as such does not exempt him from giving the special bond required by section 1197, Code 1871, of all administrators making sales of land. Such sale made without the special bond is void. Heth *v.* Wilson, 55 Miss. 587.

Where a bond required of an executor by a decree for the sale of the land was executed and filed on the day of the sale, and the decree recites that the

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Statement of the Case.

This was a suit for a *devastavit* against a surviving executor and his surety on a bond. Appellees are the children of Emily Stewart, deceased, daughter of Joel Barnett, who died July 30, 1851. In the last will of Joel Barnett, probated August 5, 1851, special provision is made for his widow as follows: "I give unto my beloved wife, Mildred Barnett, seven negroes to be selected by herself out of all the negroes that I may die possessed of: I give unto her all my household and kitchen furniture: I give unto her such portion of my plantation tools as she may choose to select: I give unto her five hundred and fifty acres of land to be located around my residence in such form as she may desire: I give her all my stock of horses, hogs, and cattle: I give her an equal share with all my children in all the moneys and debts due me, that I may be possessed of, all of which is given her during her natural life," and after making special legacies to several of his children he wills that "the balance of my estate, both real and personal, I desire to be equally divided among all my children." This will is dated May 27, 1848, and a codicil thereto dated May 21, 1849, reads as follows: "I do ordain this as a credit to my last will and testament, namely: It is my desire that all the notes on each of my sons and sons-in-law of which I may die possessed shall be deducted from the moneys accruing to them or to their children at a division of my estate." The will appointed as executors Mildred Barnett, Charles Barnett, Nathaniel Barnett, John Gilmore, and W. V. Stewart (husband of Emily Stewart, a daughter), father of appellees. Mildred Barnett and Nathaniel Barnett having renounced, letters testamentary were granted Charles Barnett, John Gilmore, and W. V. Stewart, who were duly sworn in and entered into bond in the sum of $180,000, with Nathaniel Barnett and Joel

directions of the decree and the law had in all things been complied with, this sufficiently shows that the required bond was given, although there is no express order approving it. Yerger *v.* Ferguson, 55 Miss. 190.

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A codicil duly and legally executed, which makes a disposition of the testator's property inconsistent with the disposition made in the will, is, to the extent of such inconsistency, a revocation of the will without an express clause to that effect, and it will so operate, although the disposition attempted to be made by the codicil be void for illegality. Thus, when a testator by his will gave his slaves absolutely to his widow, but by a codicil thereto gave them to her "if she should marry and have issue, otherwise that they should be set free," the codicil, though void as to the attempted emancipa-

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Statement of the Case.

B. Gresham as sureties. On the 5th of September, 1851, Mildred Barnett filed a release to all the personalty willed her (a reservation being made for a small portion of specific items), for the purpose that the same might be sold and go into the general estate of her husband. And on March 6, 1852, Mildred Barnett acknowledged and filed a release to all the land willed her with the request that said land might be sold with the residue of the landed estate of her late husband and go into the general distribution.

Amongst the notes due to Joel Barnett, deceased, was found one against W. V. Stewart, husband of Emily Stewart, one of the heirs, amounting to $7,155, due December 7, 1849, which with interest up to April 1, 1857, the date of final distribution, amounted to $10,297.30. On December 28, 1852, Mildred Barnett died and all personal property was taken in hand by the executors of the estate of Joel Barnett, deceased, for an equal distribution, with the balance of the property of said estate. In the notes and accounts thus transposed was an indebtedness due by W. V. Stewart of $906.20. On April 28, 1852, Nathaniel Barnett filed a petition for the sale of all the lands of Joel Barnett, deceased, and that willed his wife, Mildred Barnett, and afterward relinquished by her, and upon hearing thereof, the court appointed W. V. Stewart, Nathaniel Barnett, and John Gilmer, executors of the will of Joel Barnett, deceased, commissioners to sell said lands upon their entering into bond for the proper and legal application of the proceeds of same. In the sale of the land, rents for the ensuing year were reserved. Personalty belonging to Mildred Barnett, deceased, included in which was sixty-one bales of cotton raised by her on

tion, revokes the bequest of them made in the will, and the widow can only claim such interest in the slaves as is vested in her by the terms of the codicil. Read *v.* Manning, 30 Miss. 308.

The great rule for the interpretation of a will is that the intention of the testator must be ascertained from the language employed, and must be carried into effect if not inconsistent with the rules of law, and the word sare to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the will. Where there is no ambiguity in the words, there is no room for construction. Vannerson *v.* Culbertson, 10 S. & M. 150.

The words are to be construed in their plain and natural sense unless a different intention be manifested by the context. Tucker *v.* Stites, 39 Miss. 196.

In the construction of wills, the main object is to ascertain the intention of the testator; the intention is to be gathered from the whole will, and, if

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the land during the year of her death, was petitioned to be sold for division as in the matter of the land before enumerated, which was granted. The total estate thus administered amounted to $149,768.19.

On December 28, 1883, appellees filed their petition in the Chancery Court of Noxubee county against Charles Barnett and J. B. Gresham, a surety, seeking to recover $15,157.45. They allege that they are the legal heirs of Emily Stewart, a daughter of Joel Barnett, and that their mother died in the year 1853 intestate, and that no administration of her estate was ever had, and that no portion of same has ever come to them. Their father, W. V. Stewart, one of the executors of the will of Joel Barnett, died before they were of age leaving a very small estate. They charge the improper distribution of the amount falling to them as heirs of Emily Stewart, deceased; that the same was paid over to W. V. Stewart individually and not as administrator of their mother's estate — and seek to recover of the surviving executor, Charles Barnett, and surety, J. B. Gresham, that sum alleged to have been illegally distributed. A demurrer was filed, pleading the Statute of Limitations, with other grounds. On the hearing thereof, the demurrer was overruled, from which defendants appeal.

APPEALED from Chancery Court, Noxubee county, F. A. CRITZ, Chancellor.

Reversed and dismissed, December 1, 1884.

Suggestions of error overruled, March 13, 1885.

illegal, is to be carried out, notwithstanding it may violate technical rules which relate to the construction of words rather than the nature of the estate. Sorsby *v.* Vance, 36 Miss. 564.

Where a father is accustomed to make loans to his children, keeping memoranda of the same, as advancements, and his son buys land from a third person, borrowing the purchase money from his father, who pays the same to such person, taking the title in his own name as security, the son becomes, in equity, the owner of the land and the father mortgagee as to the amount so paid. And if the will of the father directs that in distribution of his estate an account shall be taken of the amounts advanced to, and the debts due from, his children, the amount so paid for the land at the instance of the son is to be treated as an advancement to him, and, as against the other heirs and devisees of the father, this is sufficient to release the debt for the money so paid. Chiles *v.* Gallagher, 67 Miss. 413, 7 So. 208.

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Attorney for appellants, L. Brame.

Attorneys for appellees, Rives & Rives, and W. P. & J. B. Harris.

Brief of L. Brame:

Under the law, as it then existed, W. V. Stewart, as husband, was entitled to the share of the estate of Joel Barnett which was devised to Emily Stewart. After making certain bequests, the language of the will is: "The balance of my estate, both real and personal, I desire to be equally divided among all my children." This, by all the authorities, was a legacy, *a chose in action,* and being a *residuary* legacy, it was not embraced in the Acts of 1839 and 1846, and accrued to the husband by virtue of the marital rights. Lowry *v.* Craig, 30 Miss. 19, approved by the court in Mitchell *v.* Mitchell, 35 Miss. 108 (see note to opinion, page 116); Cook *v.* Lindsley, 34 Miss. 451.

That a legacy is a chose in action, see Wade *v.* Grimes, 7 How. 425. This legacy vested after marriage, and, as the bill shows, the property was reduced to possession by the husband during coverture, and, therefore, his rights as husband accrued. Scott *v.* James, 3 How. 307.

This is certainly true with respect to the personal property of the estate of Joel Barnett, for which only can the appellants be held liable in this suit on the general executor's bond, as we shall hereafter show. The case of Robb *v.* Griffin, 26 Miss. 579, is the sole authority relied upon by counsel for appellees in their opposition to our view on this question. In the opinion (on page 581), the court says: "In this case the property was never distributed, and the share of complainant's wife was never set apart to her, nor was it reduced to possession by the husband." The fact that the property was never reduced to possession by the husband during coverture is sufficient of itself to distinguish this case from the other cases cited above; but whether it is distinguishable or not, the rule we insist upon was distinctly recognized and applied in the subsequent case. Whatever may be said of the correctness or incorrectness of these decisions, as an original proposition, it is sufficient that the law was so announced by this court at the time; and under these decisions the parties acted when the rights accrued are now called in question.

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The marital rights of W. V. Stewart were not excluded by the will. On the other hand they were clearly recognized. The testator provided that the share of his estate going to his daughter Mary Smith should be vested in trustees, to be managed by them for her use and benefit, and that the portion going to his daughter Lucy Ann Burke should remain in the hands of trustees, "to be managed by them for the use of her children." And the codicil is in this language: "It is my desire that all the notes on each of my sons and sons-in-law, of which I may die possessed, shall be deducted from the moneys accruing to them, or to their children, at a division of my estate." W. V. Stewart was a son-in-law, and owed the testator a note for $7,155. All this shows that the marital rights of Stewart were recognized at that time, and that it was understood that he was entitled to receive that portion of the estate in respect to which complainants seek relief in this suit. * * *

On the qualification of the executors, August 5, 1851, they gave a bond in the penalty of $180,000, with Nathaniel Barnett and J. B. Gresham as sureties, payable to the judge of probates, conditioned for the proper administration of the "goods, chattels, and credits" of the decedent. There was a large personal estate, which was administered. On April 28, 1852, Nathaniel Barnett, who was a son of Joel Barnett, deceased, and a tenant in common of the land, filed a petition for its partition, alleging that it could not be equitably divided, and asking for a sale, in order that there might be a division of the proceeds. The other tenants in common were summoned, and on August 2, 1852, a decree was entered for the sale of the lands. The decree directed John Gilmer, Charles Barnett, and W. V. Stewart, who were the executors, to sell the land, and recited that they had executed a bond "in pursuance of the statute, for the legal application of the proceeds of said sale." The sureties on the bond were J. B. Gresham and W. H. Smith, and it was made payable to the State of Mississippi, and conditioned, as stated in the decree, for the proper application of the proceeds. The land was sold for $37,788.95.

The will provided that several advancements that had been made to the children of the testator should be equalized out of his estate; but the land was not sold for this purpose. The value of the slaves belonging to the estate amounted to about $90,000, and there was other personal property. All inequalities could

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have been easily made up by a division of the slaves and other personal property, and, therefore, the executors proceeding under the will had no authority to sell the land for the purpose of equalizing the advancements; and they did not, in fact, attempt to do this. It is true that there were some inequalities among the legatees after the slaves were divided, but this was occasioned by an unequal division of the slaves. The land was sold for partition under the decree of the court, at the instance of one of the tenants in common; and the bond that was given for the application of the proceeds was signed by different parties, and for a different amount, and was conditioned differently from the executor's bond upon which this suit is instituted. This suit is based alone upon the executor's bond. The bond given for the proceeds of the land is not sued upon, and is not even mentioned or referred to in the bill. Defendants cannot be held liable in this suit for the proceeds of the land. Reeves *v.* Steele, 2 Head (Tenn.), 647, Commonwealth *v.* Hilgert, 55 Pa. St. 237; Brandt on Suretyship, § 499; Rucker *v.* Dyer, 44 Miss. 591; Whitfield *v.* Evans, 56 Miss. 488. * * *

There were nine legatees. Mildred Barnett, the widow of Joel Barnett, was given a life estate in a portion of his land and slaves. She died December 28, 1852, and the executors took charge of her estate and charged themselves up with the personalty. The crops raised by her that year were emblements and belonged to her absolutely, and constituted no part of the estate of Joel Barnett for which the executors were liable. The proceeds of the crop amounted to $2,177.94, and this sum should be deducted from the assets above, which would leave an excess of liabilities over personal assets. Therefore, deducting from the accounts the proceeds of the sale of the land, which was charged up with interest, the record shows that there is nothing for which the executors are liable in this proceeding.

It is true, as urged by opposite counsel, that the will provided that the advancements should be made equal out of the testator's estate, and that no distinction was made between the real and personal estate in this respect. But, while the will does not expressly provide that the personal property should be first resorted to for this purpose, the law required this, and there was no authority for the executors to sell the land to equalize the advancements, because there was an abundance of personal property. Besides, as

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before stated, the land was not sold by the executors under the *will*, to equalize advancements, but by decree of the *court* under partition proceedings, and a separate special bond was given in accordance with the statute, conditioned for the faithful application of the proceeds. This bond was given at a different time, for a different amount, with different sureties, to different obligees, and upon a wholly different condition from the general executors' bond. Clearly the defendants are not liable for a breach of it in this suit. Indeed, no breach is alleged, and the bond is nowhere alluded to in this bill. Nor is it even stated than any such bond ever existed. It is true, as counsel say, that complainants at their option might have been sued on this bond without joining Smith, the other surety; but they did not do so, and this is a complete answer to the claim that we are liable in this suit for any failure to properly apply the proceeds of the sale of the land. In the brief of opposite counsel, it is said that where a party holds two different characters, he must be dealt with as two different persons. We adopt this as a correct statement, and under it claim that there can be no liability in this suit for a breach of the conditions of the land bond, if there has been such breach. The suit is based alone upon the other bond, and a decree *in personam* is asked against the surviving executor and his surety thereon. Because Graham was also surety on the bond given by the executors as commissioners for the sale of the land, the court cannot "*consider*" the suit as having any reference to that bond.

We ask that the decree appealed from be reversed, and that a decree may be entered here sustaining the demurrer and dismissing the bill.

Brief of Rives & Rives:

It has been claimed by appellant that W. V. Stewart was entitled in his own right to his wife's portion of the estate of her deceased father, that her right under the will was a chose in action that accrued to her after coverture and, at common law, vested absolutely in the husband whether reduced to possession while the wife lived or not, and that the common law, in this respect, was not affected by any statute in force in this State in 1851 when the will became operative. If such claim be well founded, that ends this case.

At common law where a legacy or distributive share accrued to

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the wife during coverture and she died, her husband surviving without having reduced it to possession in life of his wife, it did not survive to him in his own right but he was entitled to recover it by acting as her administrator. 2 Kent's Commentaries, § 135. The cases of Wade *v.* Grimes, 7 How. 425, and Cook et al. *v.* Lindsay, 34 Miss. 451, and perhaps some others seem to hold that at common law a chose in action accruing to the wife during coverture vested absolutely in the husband without reduction to possession. This is a mistake. In the first case the chose in action accrued before coverture, and the court was not called upon to decide any question as to choses accruing after coverture.

In the other case it was only necessary to decide whether the husband could sue in the lifetime of his wife without joining her, and the court, relying on the first case, held that he could.

We think the distinction is plain enough. If the chose accrued during coverture, the husband could, without joining his wife, sue in his own name if he sued while she was living, but if she were dead he could not claim in his own right but must claim as her administrator.

But whatever may have been the rule at common law, this question was settled by our statutes. The Act of 1839 (Hutchinson's Code, 496), provides that "any married woman may become seized or possessed of any property real or personal by direct bequest, demise, gift, purchase, or distribution in her own name and as of her own property provided same does not come from her husband after coverture."

Whether the Act of 1839 affected the rule as to *all* choses in action of the wife or not, it certainly affected it as a "bequest, demise, gift, purchase, or right of distribution." To hold otherwise is to hold the above-quoted provision nugatory. How could a married woman ever becomes seized or "possessed of property by direct bequest, demise * * * or distribution in her own name and as of her own property" if the moment the right to the bequest or distribution accrued to her it vested absolutely in her husband?

The Act of 1846 (Hutchinson's Code, 498), provides that if a married woman "die possessed of slaves or other personal chattels as her separate property leaving issue of her body, either by a former husband or by her surviving husband, such slaves or other personal chattels shall descend to her children or child in equal

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shares; but if she die without issue surviving her, the same slaves and other personal property shall vest in the surviving husband."

In Rabb *v.* Griffin, it is held that the above-quoted words "slaves and other personal chattels of which the wife died possessed as her separate property," must be understood to comprehend all such rights and interests of the deceased wife in personal property as might have been asserted and enforced under the rules of the common law, by her administrator, and all such choses in action as by the same rules would have vested in the surviving husband *que mariti;* and "that all the rights, whether in action or possession which the wife was entitled to at her death, were intended to be vested first in her children and secondly in her husband." Rabb *v.* Griffin, 26 Miss. 582.

This was the law in force in 1851 when Joel Barnett's will became operative, and in 1853 when Emily Stewart died and her rights and interests under the will vested in her children as her heirs and distributees.

Under the statutes in force at the time of the pretended final account and decree, it was, perhaps, unnecessary to summon those minor children, but as they had no guardian it was necessary to appoint them a guardian *ad litem.* As this was not done the decree was not conclusive nor was it in any manner binding on them. The account was as to them, at best nothing more than an annual account. Code 1857, § 451, art. 32; Dohan *v.* Brown, 44 Miss. 235; Wells et al. *v.* Smith, 44 Miss. 302; Kennedy *v.* Gaines, 51 Miss. 625; Burrus *v.* Burrus, 56 Miss. 92; Bailey *v.* Fitzgerald 56 Miss. 578; Crawford *v.* Redus, 54 Miss. 702.

The case of Frisby *v.* Harrison, 30 Miss. 452, is not against us although under the peculiar circumstances of that case it was held unnecessary to appoint a guardian *ad litem.* Had W. V. Stewart been himself disinterested and had he appeared in that settlement in behalf of his children then possibly Frisby *v.* Harrison, *supra,* might have been invoked against us, but he was not disinterested; he appeared in that settlement not in behalf of his children but adversely to them. He was one of the executors filing the account and who had taken his children's money in his own pretended right. * * *

Most of the causes of demurrer assigned indicate a misconception, on the part of demurrant, of the nature of complainants' rights and of the nature and scope of their bill. When the exec-

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utors ignored the rights of Emily Stewart and of her heirs and distributees and paid over their share to W. V. Stewart on his pretended claim of right to so much of the estate of Joel Barnett, they did not thereby, in any manner or to any extent, relieve themselves from the responsibility of the trust reposed upon them as executors. W. V. Stewart could not "renounce his representative character and act under another. He could do no act in regard to the estate for which he was not amenable as executor." He could not hold the money in any other character than that of executor except "by an arrangement with the legatees." 2 Williams on Executors, §§ 1660, 1749; Angell on Limitations, § 168.

(This is not inconsistent with the rule as laid down in Davis *v.* Bowman, 55 Miss. 743, that where the interest or claim was not acquired since he became trustee but had before his acceptance of the trust he might appeal to the court to which he is subject as trustee to adjudge his rights as an individual to an interest in the property.)

So long as W. V. Stewart, who was one of the executors, retained those funds, he and his coexecutors must be held liable as upon a continuing trust until there is a valid settlement and discharge of that trust. There has been no valid settlement or discharge, the trust continues, and is not affected by the Statute of Limitations. Crawford *v.* Redus, *supra;* Jordan *v.* McKenzie, 30 Miss. 35 *et seq.* * * *

The liability rested equally upon all and each of the executors and if the remedy, as against W. V. Stewart, has been lost by his death, that does not affect the right against the survivor. We could sue any one or more of the obligors. Code 1880, § 1134.

All the surviving obligors on the bond are made parties defendant. Under our statute, the surety Gresham was at least a proper, if not a necessary, party defendant. Code 1880, §§ 1834, 2084. * * *

Brief of J. B. & W. P. Harris:

The title of Mrs. Stewart was clear under the Acts of 1839 and 1846, and on her death in 1853 it descended to her children. Mitchel *v.* Mitchel, 35 Miss. 100; Clerk *v.* McCrary, 12 S. & M. 437; Duncan *v.* Johnson, 23 Miss. 130. * * *

The scope of this bill is such that should the court decide that the payments to Wiley V. Stewart were valid and binding on the heirs, an accounting would be a matter of form. * * *

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OPINION.—CAMPBELL, C. J., delivered the opinion of the court:

Passing by all other questions raised by the demurrer, we hold that upon the facts shown by the bill (which makes the record of the administration of the estate of Joel Barnett, deceased, a part of it), the complainants are not entitled to a decree in this case. The proceeds of the sale of the land of the decedent were not assets. The land was sold under the Act of 1830, and a bond was given for the proper application of its proceeds as required by that act. The money arising from this sale was not covered by the general bond of the executors, and it is to be excluded from the computation. The proceeds of Mildred Barnett's sixty-one bales of cotton are to be excluded on a like ground. By the codicil, the amount of the note of Wiley V. Stewart, a son-in-law of the testator, was to be deducted from the distributive share of Mrs. Stewart, his wife, and a legatee, and this sum is to be excluded from the computation of the personal estate covered by the bond of the executors.

The effect of the codicil was to charge Mrs. Stewart with the amount of the note of her husband as so much advanced to her under the will, and as lessening by that much her share. The executors were not liable for the amount of this note.

Excluding the several sums mentioned, it is apparent that the entire personal estate was consumed in equalizing the shares of the several legatees, and that there is nothing of which these complainants can justly complain.

Decree *reversed* and bill dismissed.

ON SUGGESTIONS OF ERROR.

Brief of Rives & Rives:

Whatever may be the privilege of Gresham, the surety, certainly Barnett, the executor, is estopped to deny that the proceeds of sale of land and sixty-one bales of cotton are assets of the estate for which he is accountable as executor.

The parties entitled under the will of Joel Barnett were the children and grandchildren, who were also the children and grandchildren of Mildred Barnett, and as such entitled as distributees of her estate each to the same proportionate part of the proceeds of the sixty-one bales of cotton as if the cotton had belonged to the estate of the testator.

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To save costs of a separate administration, and inasmuch as the rights of the parties were the same, the assets of the estate of Mildred Barnett, deceased, were treated as the assets of the estate of Joel Barnett. They were so treated by the executors, who, under the solemn sanction of their oaths, reported such assets as assets of their testator. They were so treated by the court in its various orders and decrees. No adverse claim has ever been set up thereto. It is now too late to reach those assets through an administration of the estate of Mildred Barnett, and will this court say to the executor, You took those assets as assets of your testator; you reported them under your oath as such; you held them as such until all adverse claims thereto are barred by limitation; now we will allow you to say that your sworn report was untrue, that you acted wrongfully in taking and treating these assets as you did, and you may then relieve yourself of all liability to account for the money thus wrongfully taken by you?

The same reasoning applies precisely to the proceeds of the sale of the land. The executor treated such proceeds as assets of his testator until all remedy on the land bond is barred by the Statute of Limitations and now says, It was wrong in me thus to take, hold and treat such proceeds. I will take advantage of my wrong and relieve myself of all liability to account for such proceeds. Will this court sustain him in thus taking advantage of his own wrong?

As heirs of the grandfather, then, complainants would have been entitled to their same proportion of the proceeds of the land sale as they now claim under the will, but this executor, knowing that their rights on the land bond are now barred, changes for the first time his attitude with reference to such proceeds, and relieves himself from all liability. Such a course is too shocking to equity and conscience to be permitted by this court when once its attention is directed to it.

In Irby *v.* Mitchell, 42 Ala. 438, the question was raised whether an administrator who took possession of property as the property of the estate, and sells it, having no claim to it himself, and no other person making claim for it, can relieve himself from liability to the estate by setting up a claim adverse to the estate. It was held that he could not, and the decision was based upon the doctrine that a trustee who receives property as assets of the trust cannot resist liability on the ground of an adverse title which has never been asserted against him. The court remarked that "The

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administrator did not pretend to have any right to the cotton or that anybody else was claiming it. The case was an open and undisguised attempt by a trustee to avail himself of his trust to make a personal profit out of an implied defect in the title to the property in his hands. It is to the credit of the law that it did not tolerate such a thing. Bigelow on Estoppel, 383."

This court has held that while it is true that an administrator has no control or authority over the freehold estate of his intestate, yet, " After the administrator has received the rents and accounted for them to the Probate Court as assets of the estate, he will be precluded from alleging that he received the rents without authority, and must be chargeable with them as for assets rightfully received."

His own voluntary accounting must be conclusive against him as to his authority to do the act, and he cannot be permitted in a subsequent accounting to reopen his own accounts, and to deny his right to receive funds with which he had charged himself. Crowder *v.* Shackleford, 35 Miss. 359.

We will only add that the questions as to whether the proceeds of the sale of the land, and of the sixty-one bales of cotton, were to be considered as assets of Joel Barnett's estate or not were certainly discussed by counsel in oral argument before this court on first hearing, though possibly not in the briefs filed.

ON SUGGESTIONS OF ERROR.

OPINION.—COOPER, J., delivered the opinion of the court in reply to the suggestions of error submitted by the appellee:

In deciding that, under the facts shown by the record in this cause, the appellee cannot call upon the surviving executor to account as such for the proceeds arising from the sale of the lands of the testator, or for the cotton derived from the estate of Mildred Barnett, we do not depart in any degree from the rule announced in Crowder *v.* Shackleford, 31 Miss. 321. In that case, the administrator had with the assent of the heirs-at-law received the rents and profits of the real estate, charged himself with them in his accounts to the court, and paid debts to an amount exceeding the rents thus received. Years afterward, when exceptions were taken to his final account, he attempted to repudiate the appropriation which had been made, and sought to obtain a double credit, one by retaining on the credit side of his account the amounts

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which he had paid on the debts of the estate, and the other by striking from the debit against him the rents which he had received and disbursed.

In the case now before us, it unmistakably appears that the cotton received from the estate of Mildred Barnett was divided among those who claimed to be entitled to it, the father of appellees claiming in right of his wife and his claim being recognized by the executors of Joel Barnett. As executors they had no concern with the property of Mildred, and though by intermeddling therewith they became liable personally to the distributees of that estate, this did not fix a responsibility on them as executors. If it appeared that, having received and charged themselves with this cotton, they had made no disposition of it and that no claim had been made for it by the distributees of Mildred, then the rule announced in Crowder *v.* Shackleford might be invoked.

But it would be a hard application of any rule to hold that where representatives of an estate had taken property of third persons and charged themselves with it in their representative capacity, they could not return the property to the true owner and thus discharge themselves from responsibility to the distributees of the estate which they were administering. It is immaterial that in making return in this case the executors have delivered the property to persons not in fact entitled to receive it; this, though it would render them liable in a suit at law brought by the distributees of Mrs. Barnett, gives no cause of action by the distributees of Mr. Barnett, nor does the fact that the distributees of Mr. and Mrs. Barnett are the same persons change the character of the liability of the parties responsible for the wrong distribution.

The right of the heirs-at-law of Joel Barnett arising from the wrongful distribution of the proceeds of the land sold for partition is to go against the persons who acted as commissioners of the court in making the sale, and against the bond given by them for the proper application of the proceeds. It is true that these commissioners were also executors, but they sold under a decree rendered in a suit brought by one heir-at-law against the others for partition, to which the executors were not parties. It is manifest that the executors have charged themselves in their representative capacity with funds distributed by them as commissioners in the chancery suit, and it is now attempted to hold them because of the form rather than of the substance of the transaction.

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A review of the whole record demonstrates that the account was made in the shape in which it now appears, by reason of the fact that the executors were also the commissioners by whom the sale had been made, and by whom the fund arising therefrom was to be distributed, and hence it was that they mingled their independent settlements and reported that they had done as executors what in truth they had done as commissioners. By the same account in which they charge themselves with the fund, they show its distribution.

We adhere to the decree before rendered.

W. T. BURRELL et al. v. ELMYRA ANDERSON et al.

Guardian Ad Litem — Answer to Bill — Service.

In a suit by an administrator of an estate, against all the heirs, it is proper for the court to appoint a guardian *ad litem* for such of the heirs as are minors, and direct that the guardian *ad litem* answer the bill, without other service.[1]

Publication — Notice — Nonresident.

The publication for a nonresident defendant is not void, where the particular place within a county where the Chancery Court to which he is cited to appear is not named in said publication.[2]

Writs of Assistance.

A purchaser of land under a decree of the Chancery Court is entitled to a writ of assistance from the chancellor of said court, commanding the sheriff of the county to dispossess a holder who refuses to vacate the premises.[3]

1

An infant can only appear by guardian. He cannot appear by attorney. Lee *v.* Jenkins, 30 Miss. 592.

A guardian *ad litem* can be appointed only after an infant has been served with process. Prewett *v.* Land, 36 Miss. 495; Stanton *v.* Pollard, 2 Cush. 154; Price *v.* Crone, 44 Miss. 571; McAllister *v.* Moye, 30 Miss. 258; Ingersoll *v.* Ingersoll, 42 Miss. 155; Johnson *v.* McCabe, 42 Miss. 255.

The answer of the guardian *ad litem* must not be his personal answer, but the answer of the infant, and no decree can be made on any admission contained in the answer, but the case against the infant must be made on proof *aliunde*. Ingersoll *v.* Ingersoll, 42 Miss. 155; Johnson *v.* McCabe, 42 Miss. 255; Wells *v.* Smith, 44 Miss. 296.

Nor has the guardian *ad litem* power to submit the infant's rights to arbitration. Fort *v.* Battle, 13 S. & M. 133.

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Statement of the Case.

This action was begun in the Chancery Court of Panola county by the administrator of the estate of H. B. Burrell, deceased, against the heirs, a widow and ten children, to condemn the sale of certain real estate described in the petition, belonging to the estate. There were debts outstanding against deceased amounting to $303.87, which had been duly proved and filed with the administrator. It was alleged that there was no personal property belong-

A decree to sell land of infant without appointment of guardian *ad litem* is void. McAllister *v.* Moye, 30 Miss. 258.

It is only when the infant has no legal guardian, or the guardian being legally summoned has failed to appear, or is interested adversely to the infant, that a guardian *ad litem* may be appointed. Winston *v.* McLendon, 43 Miss. 254; Wells *v.* Smith, 44 Miss. 296.

After due service on an infant, and appointment of a guardian *ad litem*, the latter may consent to a hearing at any time. Pollock *v.* Buie, 43 Miss. 140.

All who have a beneficial interest in lands, the subject-matter of a suit in equity, are necessary parties. McIlvoy *v.* Alsop, 45 Miss. 365; Barry *v.* Barry, 64 Miss. 709, 3 So. 532; Harding *v.* Cobb, 47 Miss. 599; Harlow *v.* Mister, 64 Miss. 25, 8 So. 164.

The failure to appoint a guardian *ad litem* for an infant in a chancery suit for the sale of his land is not such an error as renders the decree absolutely void. Therefore, it cannot be collaterally attacked. McLemore *v.* Railroad Co., 58 Miss. 514; Cocks *v.* Simmons, 57 Miss. 183.

Since the Code of 1880, the court is not required to appoint a guardian *ad litem*, but may do so. Code 1892, § 553.

There is a distinction between the practice in chancery and probate matters as administered in the Chancery Court, as to the manner of serving process on minor defendants. In the former, the infant must be personally served, and also the father or mother, etc.; while under the probate practice, it is generally sufficient to serve the guardian. So held prior to the Code of 1880. Saxon *v.* Ames, 47 Miss. 565; Burrus *v.* Burrus, 56 Miss. 92.

Under the Code of 1857, where summons is for minors, and also for their mother, as a defendant, and the return shows execution by delivering a true copy to each of the defendants named in it, this sufficiently shows service as to the minors. It is not necessary that a copy shall be handed the mother for the children, in addition to that delivered to her on her own account. McIlvoy *v.* Alsop, 45 Miss. 365.

In proceedings in the probate court affecting the rights of an infant, it is necessary, under the Code of 1857, that his guardian shall be summoned, if he has one, and if the guardian is adversely interested or fails to appear, then that a guardian *ad litem* shall be appointed for him. It not being required that the infant shall be cited, his being summoned is not a prerequisite to the power to appoint a guardian *ad litem*. (McAllister *v.* Moye, 30 Miss. 258, overruled; Miller *v.* Palmer, 55 Miss. 323, explained.) Burrus *v.* Burrus, 56 Miss. 92.

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ing to said estate, above the exemptions. The real estate comprised 160 acres and upon the west half of same was located the homestead and other improvements. Citation was duly made against all the heirs, who appeared not, and a *pro confesso* was taken against them. But it appearing that two of said heirs were minors, a guardian *ad litem* was appointed to defend their inter-

2

Although the guardian *ad litem* of minor parties to a suit has filed for them a mere formal answer, it is his duty to object to incompetent testimony that affects adversely their interest. But, regardless of the failure of the guardian *ad litem* to object, the Chancery Court should, of its own motion, reject such testimony. Neblett *v.* Neblett, 70 Miss. 572, 12 So. 598.

It is the duty of the court to ascertain that summons has been duly executed on an infant before appointing a guardian *ad litem*. Hence, although the only summons for a minor, shown by the record, appears not to have been served on him, a chancery decree for the sale of the minor's land, based thereon, cannot, for this reason, be attacked collaterally if the order appointing a guardian *ad litem* recites that summons was duly executed on such minor. Cocks *v.* Simmons, 57 Miss. 183.

Recital in decree of Probate Court held not sufficient to show citation for minor. Kennedy *v.* Gaines, 51 Miss. 625.

In an application by a guardian to sell land of minor wards, under article 153, p. 464, Code of 1857, it is not necessary to state whether they had near relatives in this State; nor is it necessary that parents, when served with process on account of their minor children, be shown to be such, either in the process or in the return. Harrington *v.* Wofford, 46 Miss. 31.

Both by the rules of Chancery Court, and the general principles of equity jurisprudence, a guardian *ad litem* cannot be appointed for an infant defendant until the court has acquired jurisdiction over the infant by personal service of process, if he be within the State, or by publication, if he be a non-resident; and an appointment made without such service or publication will be erroneous, and a decree rendered against the infant will be reversed. Stanton *v.* Pollard, 2 Cush. 154; Prewett *v.* Land, 36 Miss. 495.

3

Under section 1267, Code 1871, empowering the clerk of the Chancery Court to issue any final process necessary to execute decrees, on a decree for the sale of land it is proper to direct that a writ of assistance shall issue, if necessary, to put the purchaser in possession. The writ issues upon proof of service of the decree on defendant, demand of possession, and refusal to surrender. Griswold *v.* Simmons, 60 Miss. 123.

The object of the writ of assistance is to put one who has purchased land at a judicial sale into possession. It applies to any sale whereby the title passes to the purchaser, and where the person in possession was a party to the suit, or came into possession *pendente lite*. The court will give full redress by placing the purchaser in possession. Jones *v.* Hooper, 50 Miss. 510; Gibson *v.* Marshall, 64 Miss. 72, 8 So. 205.

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est, who answered the petition, praying for just and proper action of the chancellor. Petitioner asked that so much of the land as was necessary be decreed to be sold to pay the debts enumerated, and on the hearing thereof, eighty acres off of the east side of the quarter section of 160 acres were decreed to be advertised and sold, under due process. At the sale thereof, one Anderson purchased same for the sum of $400, but prior to the delivery of the deed to the purchaser a bill was filed by W. T. Burrell, one of the heirs, asking for a "stay of execution," alleging that the citation made for the nonresident heir was void. Said citation reads as follows: To C. B. Burrell: You are commanded to appear before the Chancery Court of Panola county, in said State, on the second Monday of May, 1883, to plead, answer, or demur to the petition of R. C. Balch, as administrator of the estate of H. P. Burrell, deceased, for sale of land wherein you are defendant." This motion was overruled by the chancellor. Anderson filed a writ of assistance, alleging that demand for possession of the land had been made upon W. T. Burrell and refused, and asking that the sheriff be commanded to dispossess the said W. T. Burrell, which petition was granted. A supersedeas bond was duly filed and defendants appeal.

APPEALED from Chancery Court, Panola county, First District, J. G. HALL, Chancellor.

Affirmed, January 19, 1885.

Attorney for appellant, W. D. Miller.

Attorney for appellee, J. B. Boothe.

Brief of W. D. Miller:

* * * I respectfully submit that the sale and proceedings were all void, and the exceptions to the report of sale should have been sustained.

First. Because there was no service of process on the defendants. The officer's return is "executed by personal service and by handing a true copy of the within writ to the defendant," when there were *eleven* defendants, and it is impossible to tell from the return which one the officer meant; he evidently served it upon one

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only; if upon all, he should have said *defendants;* but the very language of the return shows that it was served but upon one, because, he says, "a true copy" to the "defendant;" if he had served upon all, he would have said true *copies,* or a true copy to *each* defendant, so that it was not a mistake merely of the officer in writing the return, and even if this was so, it cannot be presumed in so important a matter as that which gives jurisdiction over the parties. 59 Cal. 342; 29 Tex. 273.

Neither does the return show that process was served upon the guardian of the minors, and if it be a fact that there was no guardian, the return should so state. Erwin *v.* Carson, 54 Miss. 282.

And further as to service of process on infants, see 42 Miss. 155, 255; 43 Miss. 129, 254; 1 Heisk. 734.

Again, the publication of notice to the nonresident defendant does not show *when, where,* or *to what court* he is commanded to appear, but simply commands him to appear before the Chancery Court of Panola county on second Monday of May, 1883. The county of Panola has two court districts in each of which courts are held having *exclusive* jurisdiction, and practically the two districts are the same as two counties, Batesville the county site of one, and Sardis the other, as separate and distinct in all matters pertaining to litigation and the holdings of courts, venue, etc., as two counties. See Acts 1878, page 147, creating the two court districts. Freeman on Judgments, § 126; 24 Iowa, 163.

The sale was made of the east half of the quarter section, when the petition shows that there was a homestead and dower interest, and thus the court virtually makes a partition of the land in a proceeding not instituted for that purpose and of which the parties had no notice. The homestead should first have been set apart, before the sale, or the whole tract sold subject to the homestead and dower as prayed in the petition filed by the administrator. It was error to order the sale of any distinct portion of the land until the homestead and dower was set apart, and it would have been error, even in a proper proceeding, to make partition without the appointment of commissioners for that purpose. * * *

Brief of J. B. Boothe:

The exceptions to the report of sale of the administrator in this case were properly overruled.

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First. Because process was properly issued and executed, as to the resident defendants, and publication properly made as to the nonresident defendant. All of the resident defendants were named in the writ, and the officer's return is "executed by personal service and by handing a true copy of the within writ to the defendant." Surely the clerical omission of the letter "s" to the word defendant will not vitiate the return. If the sheriff had served the process on one of the defendants only, in order to have made his return complete, he should have named that defendant, and stated further in his return some reason for not executing process upon the other defendants. The presumption that the sheriff did his duty in the premises being in his favor, it follows, without proof to the contrary, from the language of the return itself, that all of the resident defendants were duly served with process. As a matter of fact, the officer in filling out a printed form of return in which the word "defendant" was printed, omitted to add the letter "s" to the printed word.

The record shows that Clara Burrell, as the mother of the minor defendants, was made a party defendant, and shows that she was embraced in the writ as one of the persons the officer was required to summon. If she was summoned, as maintained by appellees, there was no need for the sheriff to state in his return that there was no guardian. It is sufficient if the record shows service of process on the father, mother, or guardian; and in this case it shows service of process on the mother and that the father is dead. Ervin *v.* Carson, 54 Miss. 282; McIlvray *v.* Alsop, 45 Miss. 366; Harrington *v.* Wofford, 46 Miss. 31; Smith *v.* Pattison, 45 Miss. 619.

It is not necessary that the notice to a nonresident defendant should show anything more than the notice given in this case. That, so far as the time, place, and court are concerned is an exact copy of the notice prescribed by section 1855, Code of 1880. The notice commands the defendant "to appear before the Chancery Court of Panola county on the second Monday of May, 1883." The law fixes the *time* and *place* of the meeting of the court on that day, and on examination of the notice prescribed by the Code of 1880, section 1855, it is clear that the law contemplates that parties must at their peril take notice of the *time* and *place* fixed by it. * * *

As the homestead was definitely fixed in the petition by the

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legal subdivision of eighty acres, the largest amount exempt in this case, it would have been detrimental to the interest of the estate to tax it with the expense of setting aside the homestead by the appointment of commissioners.

Sections 2039, 2040, leave it for the Chancery Court to determine what portion of the land of a deceased person may be sold for the payment of debts, without the appointment of commissioners, but the homestead being exempt property cannot be so disposed of where there are children and a widow surviving, and the homestead, as a matter of fact, was not sold. * * *

Again, the chancellor did not err in granting a writ of assistance. In the case of Griswold *v.* Simmons, 50 Miss. 123, the right to the writ of assistance is fully recognized; and in this case it appears it was obtained in due conformity to law, and it was eminently a *proper* case for the grant of the writ. See also Jones *v.* Hooper, 50 Miss. 510.

Upon a review of the whole case, I insist that the proceedings and sale ought to stand. The *identical* land for which sale was prayed was sold after due notice, and all other intermediate steps required by law; the purchase money was paid and deed executed to the purchaser, and writ of assistance awarded. There being no error in the decree of sale, no error in overruling exceptions filed, no error in confirming sale, and none in granting writ of assistance, the sale ought to stand as made, and the purchaser put in possession.

OPINION.— PER CURIAM:

It sufficiently appears by the record that the court obtained jurisdiction over the infant defendants.

The order appointing the guardian *ad litem* recited that it was made to appear to the court that the infants had no guardian. The proceedings were instituted by the administrator of the father and the petition states that the decedent left a widow and ten children surviving him. The reasonable inference is that this widow was the mother of the infants, or that their mother was dead.

The publication for the nonresident defendant was sufficient. The law fixed the place at which the Chancery Court of Panola county should be held at the time named in the notice.

On the facts shown there was no error in the action of the

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chancellor in dealing with the land as if the east half thereof constituted the homestead, and in selling the other half for the payment of debts.

The writ of assistance was properly granted. Griswold *v.* Simmons, 50 Miss. 123; Jones *v.* Harper, 50 Miss. 500.

TISHOMINGO SAVINGS INSTITUTION *v.* O. C. CARR et al.

TISHOMINGO SAVINGS INSTITUTION *v.* H. J. DUKE.

Foreclosure Sale — Rights of Creditors — Constructive Notice.

It is not incumbent on the truste in a trust deed or the holder of notes secured thereby to give special notice to a judgment creditor whose lien is subordinate. When a foreclosure sale has been advertised as provided by the terms of the instrument under which the sale is made, and in accordance with the statutory provisions on the subject, all creditors are charged with constructive notice.[1]

Devise of Land — Failure of Title — Executor's Liability.

A devisee under a will has no claim against the executor for a failure of title to lands which he had received from the testator. And the admission of such an indebtedness by the executor and an assumption to pay such claims will not operate as a claim against the estate of the executor as against creditors.[2]

Mortgaged Personalty — Sale by Executor and Application of Proceeds — Rights of Judgment Creditors.

An executor of an insolvent estate has no right to divert the proceeds of mortgaged personalty to the payment of unsecured debts, leaving the mortgage to operate on the lands to the exclusion of a judgment creditor, whose lien is subordinate to that of the mortgage.

Rents from Mortgaged Property — Application of.

Rents from mortgaged property of an insolvent estate cannot be partitioned among residuary legatees to the exclusion of creditors of the estate.

1

As to notice of sale under a trust deed the instrument must control, and compliance therewith is all that the law demands. Johns *v.* Sergeant, 45 Miss. 332.

A trustee in a mortgage with power of sale, on default in the payment of the debt, may execute the power without the intervention of a court of equity, and a sale made by him, in accordance with the terms of the mortgage, is a

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Points of Counsel.

Suit by H. J. Duke against the Tishomingo Savings Institution to enjoin an execution sale to satisfy a judgment. From a decree perpetuating the injunction this appeal is prosecuted. Reversed.

APPEALED from Chancery Court, Pontotoc county, A. B. FLY, Chancellor.

Reversed and remanded, January 24, 1887. Affirmed in part.

Attorneys for appellant, T. D. Young and J. M. Boone.

Attorneys for appellee, Fontain & Mitchell and James H. Barr.

Brief of Young & Boone:

As the two above-styled causes were heard and determined together by the court below, and are intimately blended in points of law and fact, it is thought better to likewise submit them here.

Appellant respectfully insists that the following language contained in the said McCaw trust deed under which a part of the lands in question were sold, viz.: "And if said sums of money shall not be paid at the maturity thereof or thereafter when called for, then the said James H. Barr shall sell * * *" made it absolutely essential to a valid sale of said lands under said trust deed, the said sums not having been paid at the maturity thereof, that a call or demand for the payment of said sum should be made on the payor, or his legal representatives, prior to the advertisement and sale of said lands under the said trust deed; for otherwise there could have been no default sufficient to warrant such sale. Indeed, it is so charged in the answer and cross-bill of appellant, and not denied by Mitchell or Carr, appellees, or either of them. And, therefore, to that extent should have been taken by the court below as confessed. See Code 1880, page 521, § 1892. "No title

perfect foreclosure and a bar to the equity of redemption. Sims *v.* Hundley, 2 How. 896.

2

An administrator selling land under an order of the Probate Court is not bound to warrant the title. Campbell *v.* Brown, 6 How. 106.

He sells the title as it exists. If he were to make a warranty it would probably bind himself only. Miller *v.* Boarman, 13 S. & M. 100.

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passes by a sale under a power contained in a mortgage unless the conditions thereof are strictly complied with." Smith *v.* Brown et al., 4 Allen (Mass.), 516; Hall *v.* Towell, 45 Ill. 493; Wade *v.* Thompson, 52 Miss. 367; 13 S. & M. 763.

It is insisted that in order to a valid sale under the terms and provisions of the trust deed under which said Huntington made a pretended sale of some of the lands in controversy, owing to the following language therein contained, to wit: "If the said party of the first part shall fail * * * then the said party of the second part * * * may and shall enter into and take possession of said real and personal estate and sell the same."

It was vitally necessary for him to have actually entered and taken actual possession of said property before advertising and selling the same, but which he, the said Huntington, testifies he did not do. That in fact he had never seen any of it and did not even know it was advertised for sale till about the hour of sale, when he was, for the first time, advised of it by the said H. J. Duke. And the answer and cross-bill charges the fact which is not denied by appellees or either of them. Code 1880, § 1892; Smith *v.* Brown et al., 4 Allen (Mass.), 516; Hall *v.* Towell, 45 Ill. 493; 52 Miss. 367; 13 S. & M. 763.

That in order to protect the interest of appellant and the other creditors of said estate, which appellees in good conscience and fair dealings were bound to do, having assumed the management of the same as attorneys, agents, etc., of the said executor, in his absence, he being a nonresident of the State of Mississippi, it was essentially necessary, said estate also being insolvent, that the said trust deeds should have been foreclosed under a decree of the Chancery Court; especially as the answer and cross-bills of appellant charge that said property would have been sold for a great deal more money than it did, if said trust deeds had been regularly foreclosed through the Chancery Court, which is not denied by appellees in their answers thereto, and the only witness, Mr. Rogers, who was interrogated on the subject, said, in answer to cross-interrogatory, that "the title to all the Duke lands in his neighborhood were considered so doubtful and mixed that it was almost impossible to make a sale of them after his death," and farther on in rebuttal, that if a bill had been filed and the titles to the land cleared up they would have sold for a great deal more than they did sell for at said sales. Now, under such a state of

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things, it seems to me, at least, considering all the circumstances surrounding these cases, that the court is bound, in the just administration of the law, to set aside said sales. And that too, on the above ground, independent of the other evidences of fraud in the premises. Perry on Trusts, § 602; Peck *v.* Peck, 9 Yerg. 304; 2 Story's Equity, § 1276, note 1; Myers *v.* Lee, 2 Lea (Tenn.), 159.

While appellant urges the inadequacy of the price paid for said lands by appellees at said sales, as shown by the evidence in the cases, was quite sufficient to have warranted the courts below in rendering decrees setting the same aside, appellant respectfully insists that it was not necessary, under the law and the fact involved, but only requisite for it to establish to the satisfaction of the court, that (situated as all the parties were, taking into consideration the relationship of all the parties to each other and to the estate of said decedents, and the rights and condition of appellants with its judgment against said decedents, which was a lien on his property, yet not having the power, owing to the peculiar statute of the State, to proceed under its special execution to make its money, by selling the equity of redemption in said property, till after the expiration of twelve months from the death of said decedent, which had not elapsed when said sales in question were made), appellees sought and obtained an unconscionable advantage of it in the sale and purchase of said property, and that it sold for less than its value under said trust deed, which they did; because the proof shows they purchased the McCraw trust deed for the sole purpose of speculation. And if they wanted no advantage and sought none of appellant, why this purchase of the McCraw trust deed and sale thereunder by the very party who had been requested to advise appellant, within two days before its purchase, if he should know of any steps taken by any one to sell thereunder (in order that it might protect itself), and didn't do it. Certainly this discloses such a fraud upon the rights of appellants and the other creditors of said estate as will not be tolerated by a court of equity, even if there were no other question of fraud and wrongdoing involved.

The entire manner and conduct of the appellees in reference to the management of the effects of said estate unmistakably revealed their reckless and most outrageous disregard of the interest of the appellant and the other creditors therein, and they should be

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called to account for their sins and disgorge their ill-gotten gains.

As to special executions, see Code 1880, § 1751.

It is further insisted by appellant that the three several deeds of trust pretended to have been given by the said H. Duke, deceased, for the benefit of the said appellee, H. J. Duke, are fraudulent and void, both in law and in fact, because they were given in three successive years on the three successive crops, besides a large amount of other property, all that was available in the process of the law, at a time when H. J. Duke knew of the total insolvency of the said decedent for the same pretended debts, as appeared from the testimony of the said H. J. Duke, but without disclosing the fact in the face of said trust deed, except the second one, thus concealing the real transaction, if there was any real transaction involved, from the creditors of the said decedent, by pretending that the said decedent was in fact indebted to him in the sum of $5,000 or $6,000 in the aggregate, whereas he states, in his deposition, that he in fact only owed him about $2,200, for a part of which amount he was surety on note of said decedent to appellee Mitchell, and the other was agreed to be paid him in consideration of the failure of the title to some land which he, the said H. J. Duke, inherited from the estate of his father and was deeded to him in the division of said estate between the heirs thereto, which made it a voluntary consideration, as between him and the said decedent, and consequently not sufficient to uphold the trust deeds aforesaid, as against appellant. And the court will observe that the considerations mentioned for said trust deeds were not at all disclosed thereby, and, not being disclosed, amount to fraud as tending to hinder and delay appellants and the other creditors of said decedent in the collection of their debt and besides said trust deeds provide that in case of a sale thereunder and there is any surplus after the payment of said pretended debts, the same shall be paid to said decedent, notwithstanding he was insolvent at the time of their execution.

That there was intentional fraud on the part of the said Dukes from the beginning to the end in reference to possessing themselves of the property and effects of said estate there can be no doubt, in any reasonable mind, as all conversant with human conduct and human affairs, that will take the trouble to investigate the facts developed in the record in the cases pertaining thereto, can see.

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And the failure of the appellees Carr and Mitchell to testify as witnesses in their behalf and to introduce the executor B. F. Duke and the trustee J. H. Barr, important witnesses in the premises, in explanation of the innumerable badges of fraud clustering so thickly around the transactions in question, especially when considered in the light of the relationship existing between all parties, warranted the court in *conclusively presuming* that said appellees, Mitchell and Carr, knew of the fraudulent purpose of the said Dukes in the premises, or had the utmost good reasons to suspect and believe the same.

In fact it is charged in the answer and cross-bills of the appellant, and not denied by appellees or either of them, that the sale under the trust deeds by Huntington was made at a time when the said H. J. Duke knew said C. B. Mitchell would be absent and was absent, in order to prevent him, the said Mitchell, from bidding against him for a certain piece of land which was sold at said sale, and purchased by him for about $100, and which he thereafter sold to the said Mitchell for $300, or thereabout, which brought home to appellees Carr and Mitchell the actual knowledge of the evil intentions and purpose of the said Dukes to defraud the estate aforesaid, and the creditors thereof. Then again, the said appellee Mitchell is shown to have been the attorney of the said Dukes and to have been consulted and advised with in regard to the propriety of purchasing the McCaw trust deed and having the lands sold thereunder, and certainly he knew the object in so doing was to speculate upon the property and effects belonging to said estate, because H. J. Duke testifies that such was the purpose that actuated him therein and that he consulted with Mitchell and Fontain and Barr before doing so, etc., and that appellees purchased the land in controversy at the sale under said McCaw trust deed, notably the Long Branch place for about $900, which yielded for the year 1883 $400 in rents, of which Mitchell received $300, and very generously gave to the said H. J. Duke the other $100, "as he was coming out rather badly." The court will observe, from the record and proof in said cases, that the said sale of said lands under said McCaw trust deed in the month of June, 1883, after the said H. J. Duke as the agent of his brother B. F. Duke, the executor, etc., had rented the lands out for the year and after the sale that the crops then growing upon said lands were cultivated and harvested with the horses and mules and farming implements belonging to the said estate, and that no account thereof was made

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whatever. Will the courts of the country uphold any such conduct and fail to denounce it as a fraud? I trust not.

We first find the said H. J. Duke, according to the proof in the cases, renting out the lands belonging to the said estate, collecting the rents, paying taxes, buying and selling oxen and wagons for and on behalf of said estate as the pretended agent of the executor thereof, B. F. Duke, rendering no account of anything, then making a sale through the trustee, Huntington, at an unusual time of the year and after he, as agent of the said executor, rented them out for the year, a long list of lands belonging to said estate, all of which he purchased for about $300, and immediately sold three of the pieces for $850, with no one to bid against him but appellee Carr, who very kindly permitted him, the said H. J. Duke, to take his bids off his hands at a profit of $40 or $50, the price possibly of his failure to get the trustee to make the sale while the said Carr was off at dinner. Next we find him within two days after a reasonable request made of him by counsel for appellant, "that if he knew of any steps being taken to close out the said McCaw trust to let him or appellant know of it, in order that the latter's interest might be protected by having some one at such sale to buy the property, or made it bring its value," and after consultation had with all the parties interested, going about twenty miles away to purchase the same and having it closed out without giving any notice thereof whatever to either appellant or its counsel, even requesting N. M. Hay from whom he made his purchase not to inform them, or rather saying to him that he did not want his business in that connection "heralded." In consequence of which the said Hay, although likewise requested by counsel of appellant to give the like notice for the like reason assigned to the said Duke, failed to give them the required information, as his testimony shows. And, although the said Duke testifies that he purchased the said McCaw trust deed on speculation, and it is pretended that appellees Carr and Mitchell had no interest therein and knew nothing of, and did not suspect any fraudulent design, the said Duke had in purchasing said trust deed, and purchased their part of the property in controversy on their own hook, and in no wise for the benefit and participation therein of the said Duke, it appears that the said Duke stood by and allowed all of the property to be sold, and the most valuable pieces thereof to be bid in by the said Mitchell and Carr at a sum, to say the least of it, far below its value, conveying rents and all for the year, leav-

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ing a balance due him on said trust deed of about $1,500, with no hope of ever getting one cent of it out of said estate; for that, he testifies, was hopelessly insolvent. He even says he borrowed a large portion of the money with which he purchased the said trust deed, and then stood by and let all the lands be sold in twenty-five days thereafter, and lost $1,000 or $1,500, when he would have had nothing to do but to have purchased the lands, or have made them bring the amount of the trust deed in order to have fully protected himself.

The Long Branch place, he was informed by N. W. McWhorter, one of the witnesses, before he purchased the trust deed, was worth $4,000 or $5,000 itself. This he allowed Mitchell and Carr to buy in for $900, including the year's rent, $400, and he, as agent of the executor of said estate, in addition thereto, gave the use of the horses and mules and farming implements to cultivate and harvest the crops grown thereon the balance of the year. It seems to me that this transaction alone is sufficient to call appellees Carr and Mitchell to the witness stand in explanation of the whole matter, and that they only failed therein because they could not "stand muster." Then, again, we find the Dukes, after advising with their counsel, notwithstanding that not one dollar of the indebtedness of said estate had been paid, and notwithstanding prior legatees had not received one cent, dividing the proceeds of five bales of cotton, belonging to said estate, between themselves as residuary legatees under the will of said decedent. And when the following question is put to the said H. J. Duke in reference to the matter, to wit: "Have you kept an account between you and B. F. Duke of all the proceeds of H. Duke's estate with reference to an equal division of the same between you as residuary legatees under his will on a future final settlement to be had between you?" he evasively answered: "This cotton is the only division we have ever had." And when the same question in substance is repeated to him, he again evasively replies: "I should say that we have never had any settlement of these matters except with reference to the five bales of cotton, not farther than the accounts show that he has paid me on them." All showing very clearly that they in the outset commenced to enrich themselves and divide out between them the whole effects of said estate, regardless of the rights of appellant and the other creditors and legatees, and they have accomplished it.

Then again they shipped the cotton, about sixty bales, to New

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Orleans and sold it instead of closing it out under the trust deed as they should. And how much it brought they failed to show, except $45 or $50 per bale, and the amount which was paid to him, the said H. J. Duke, and of the proceeds of said cotton, $2,350, was misappropriated by him to the payments of the accounts on his books made by the tenants, under an arrangement with the said executor, who cultivated said lands, instead of to the payment of said pretended trust deed under which said sale was made by the said Huntington, as trustee, as aforesaid, and which sum, if it had been paid and credited on said trust deed, would have satisfied the same, admitting there was a good consideration for the notes therein described, which appellant does not do. And why will fully appear on examination of the deposition of the said H. J. Duke in reference to the same. And, therefore, said sale should be held void.

Then, too, no account of the effects of the said estate has ever been rendered to the court, no inventory thereof filed, and no authority from the court procured to carry on and cultivate the crops on said lands of said decedent, or for anything else that has been done in connection with the management and disposition of the same, and no bond given or required of said executor.

It is further insisted that if the court concludes that the fraud of appellees, or any of them, has been sufficiently established to warrant the setting aside of the sale of said lands, or any of them, or any part thereof, that they should be denied the right to have anything reimbursed them, or to in any way participate in the proceeds arising from a sale of said lands, at least till after the payment and satisfaction of the judgment of appellants. McLean *v.* Litchford, 60 Miss. 169; Hardy *v.* Thomas, 1 Cush. 544.

And it is further insisted the deposition of John H. Crawford should have been excluded by the court.

The date of the enrollment of judgments, shown by the record, cannot be impeached by the clerk. It imports absolute verity. Murrah *v.* State, 51 Miss. 652, and authorities cited.

Brief of Fontain & Mitchell:

There was no error in the decree of the court below in perpetuating the injunction granted appellee in this cause. It was unnecessary for the court to have passed upon the exceptions to the deposition of Crawford, and the bill of exceptions shows the

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chancellor did not pass upon the exceptions to said deposition, there being ample evidence for the decree as rendered without this or this evidence. Yet we say this evidence was competent to explain, in this cause, the two enrollments of said judgment; while an officer cannot impeach his official act (Stone *v.* Montgomery & Wife, 38 Miss. 83), such acts are the subject of explanation by him. Shotwell *v.* Hamblin, 23 Miss. 156; La Piece *v.* Hughes, 24 Miss. 69.

There purports to be two different enrollments of this judgment in two different books, purporting to have been done on the same day, one of them pursuant to the form and requirements of the Acts of 1878 (page 191), which act was repealed previous to the rendition of this judgment, and was, therefore, we contend, no enrollment at all, and constituted no judgment lien. The other enrollment was pursuant to the form and requirements of Code 1880, the law in force in relation to the enrollment of judgments at date of rendition of judgment, and has never been repealed or amended. See Code 1880, § 1736.

The witness does not pretend to deny that he enrolled the judgment (and cannot do so), but it is utterly impossible that he could have enrolled the judgment in both books at the same time, and it is certainly competent for him to say which enrollment was first made by him and is no contradiction of his official act of enrollment. Yet if the testimony in relation to said enrollment of said judgment is or should be held incompetent the mere fact that the chancellor did not pass upon the exceptions thereto cannot warrant a reversal of the decree. The chancellor decided the cause upon the facts, and such decision is analogous to the verdict of a jury, and must be shown to be erroneous by being opposed to the weight or preponderance of testimony. Apple *v.* Ganong, 47 Miss. 196; Partee *v.* Bedford, 51 Miss. 84; 11 S. & M. 455; 33 Miss. 433. And the party complaining must show that it was clearly wrong. Davis *v.* Richardson & May, 45 Miss. 510.

The decision of the chancellor being analogous to the verdict of the jury, and if the evidence of Crawford should be held to be incompetent, and should have been admitted as competent (much less the omission to pass upon the exceptions to it), could not have the effect to set aside the decree, first, because justice has been done and there is little prospect of a different result on another trial. Barringer *v.* Nesbit, 1 S. & M. 22; McMullen *v.* Mayo, 8 S. & M. 298. Second. It could have had no influence on this decree.

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Pritchard *v.* Mayes, 3 S. & M. 42. And third, because the decree is otherwise sufficiently proven by other and competent evidence. Fore *v.* Williams, 35 Miss. 533; Hand *v.* Grant, 5 S. & M. 508.

There is nothing in the fourth assignment of error; the bill alleges and the proof shows as to the land purchased under McCaw deed of trust both a demand from Henry Duke, the grantor in said deed in trust, during his lifetime, and of his executor since his death, before Barr, the trustee, made the sale. Nor was it necessary that Huntington, the trustee, should have taken possession of the lands before he could have sold the same. After breach of condition the possession of the land became vested in the trustee (Huntington) by the deed in trust, the right of the grantor to the possession then ceased, and there could be no adverse holding by him as against his deed, nor was there any objection to said sale either before or at the time, for this or any other cause. The trustee's deed conveyed the title to said land to the purchaser, whether he took possession of the land or not (the title to land passing by deed and not by delivery of possession), and any one having an interest in or claim to land may sell the same, notwithstanding the possession may be held (even adversely) by a third person. Cassedy *v.* Jackson, 45 Miss. 397.

Therefore if Huntington, the trustee, should have taken possession of the land before sale, it was only because the deed in trust required it. But we say that this is a personal privilege, and none but the grantor or his representatives could require that the trustee should take possession. Appellant cannot complain. Wade *v.* Thompson, 52 Miss. 367; Wightman *v.* Reynolds, 24 Miss. 681.

Nor can the trustee impeach his deed. Walker *v.* Brungard, 13 S. & M. 760.

The case of Roarty *v.* Mitchell, 7 Gray, 243, relied on by appellant in the court below, was a contest between the grantor in the deed of trust, and the purchaser at the trustee's sale.

The fifth assignment is equally untenable. It was not necessary, or at all essential, that resort should be had to the Chancery Court to foreclose the deed in trust. The trustee may sell under the power after the death of the grantor in deed. Perry on Trusts (3d ed.), § 602; Hyde *v.* Warren, 44 Miss. 13.

Nor was it essential that the claim should have been probated. The failure to probate could not have the effect of barring the right to enforce lien against the property conveyed in the deed in trust. Code 1880, § 2031.

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The court could not have held that the several trust deeds were frauds in law or in fact; they were neither. The charge of fraud is that H. Duke owed H. J. Duke nothing. The proof taken to establish this charge shows positively that he was indebted to H. J. Duke in a large amount, and owing him, he, H. Duke, had the legal right to prefer him, and to do this executed the deeds in trust, and although, at the date of the execution of the deeds of trust, appellant's suit was pending, and would shortly have ripened into judgment, and that the Dukes were related, being second or third cousins, the only way in which appellant could vacate the deeds is to show the security was a sham, never to be enforced, that the debts secured are simulated, or that some benefit is reserved to the grantor. Surget et al. *v.* Boyd, 57 Miss. 485.

Nothing of which the appellant has done but has wholly and entirely failed. Nor was there any fraud in the purchase of the McCaw deed in trust by H. J. Duke, or in the sale thereunder. The only charge of facts in relation to this purchase of the debt secured by this deed of trust that would constitute a fraud in the cross-bill is that H. J. Duke paid for the debt with money belonging to Henry Duke's estate. This the testimony clearly and positively disproves, and the charge stands unsupported by any evidence whatever in the cause. Fraud cannot be presumed; it must be proven.

Appellee occupied no relation whatever to H. Duke's estate that prevented his purchasing the debt, and after purchasing, nothing to prevent his becoming a purchaser either at the trustee's sale, under this deed of trust, or under the deeds in trust executed by Henry Duke to secure his indebtedness to him. The *cestui que trust* may purchase at the trustee's sale. Perry on Trusts (3d ed.), § 602v and note 4; Walker *v.* Bungard, 13 S. & M. 766.

The sales under the different deeds in trust under which the lands were purchased by appellee in this cause were all fair ones. The notices of the sale made by Huntington, trustee, were posted up by appellee pursuant to the deed in trust, with Huntington's ratification and approval. The trustee may employ the *cestui que trust* as agent to effect a sale. Perry on Trusts, § 775.

None of the acts *in pais* which the trustees were required to perform are shown by the proof to have been omitted; they are, therefore, all presumed to have been done. Graham *v.* Fitts, 53 Miss. 307.

The land, as the proof shows, at said sales brought its full, or at

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least its fair value, and we are unable to perceive how any fraud was perpetrated, or how the sales could be an unconscionable advantage over appellant. There could be no error in holding whether the judgment was a lien or not; it was junior to the liens created by the deeds in trust, which were executed and duly recorded long before the rendition or enrollment of the judgment.

It is, therefore, respectfully submitted that appellee is entitled to the relief sought, and that the relief granted in the court below is entirely consistent with the facts in his bill and fully proven, and that the decree of the court below ought to be affirmed by this court.

Brief of James H. Barr:

The questions involved in these cases are chiefly of facts. Whether the allegations of fraud have been sustained, or, as to the want of consideration in Duke's trust deed, have been proved, and whether the lands sold for such a grossly inadequate price as of itself would justify a setting aside of the sales, etc.

The first and second causes of error raise these questions on the sufficiency of the testimony, and I here assert confidently that there is not a single allegation of fraud in the cross-bill which has *any* testimony whatever to support it. Not only are they not supported by the testimony but they are wholly, abundantly, and circumstantially negatived. The same is the case as to the want of consideration for the deeds of trust under which the sales were made. Appellee establishes beyond cavil or suspicion the *bona fides* of each debt and shows the consideration of the notes and accounts by undisputed accounts taken from his mercantile books, entered, closed, and made in the lifetime of Henry Duke, and prior to any difficulty with creditors. The exhibits in connection with Duke's testimony demonstrate this beyond peradventure. The court will not reverse the decree of the chancellor on the facts, unless it be shown by appellant that the decree was clearly wrong and against the preponderance of the evidence. The presumptions are in favor of the correctness of the decree, and much the same rule governs as is applied to that of the verdict of the jury. Davis *v.* Richardson, 45 Miss. 500; Porter *v.* Bedford, 51 Miss. 84; Apple *v.* Ganong, 47 Miss. 189.

The case was decided by the chancellor, as expressly stated, without considering Crawford's testimony, and upon the hypoth-

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esis that the judgment under which the levy was made had been duly enrolled during the lifetime of Henry Duke.

The testimony of H. J. Duke positively and unequivocally shows that demand for said money had been made of Henry Duke in his lifetime and repeatedly of B. F. Duke, his executor, after his death. And that N. M. Hay, Mrs. McCaw's agent, after time and again making demand, had written to myself to know whether I would act as trustee in selling said lands, and this testimony is undisputed. In addition to this, N. M. Hay, appellant's own witness, testifies that he made demand as agent for Mrs. McCaw, of Henry Duke in his lifetime, and of B. F. Duke and H. J. Duke, after Henry Duke died. There is not a word of proof to the contrary. Even if a demand under the trust deed was a condition precedent to the right of trustee to sell, which we do not believe, yet this could only be invoked by the grantor in the trust, as it was intended for his protection alone, and cannot be urged as an objection to the sale by any one not a party to the deed of trust, and as to such parties is no cause for setting aside a sale. Wightman *v.* Reynolds, 24 Miss. 681; Wade *v.* Thompson et al., 52 Miss. 374; 2 Perry on Trusts (3d ed.), § 602dd.

The proof is so overwhelming on the question of inadequacy of price that the chancellor announced from the bench when he rendered his decision that the testimony not only failed to show an inadequacy of price, but on the contrary demonstrated that the land sold for more than it was worth, at least a greater portion of it did. The rule of law governing the setting aside sales for inadequacy of price is too familiar to the court to need citation of authorities.

The deed of trust to Mrs. McCaw, which it is alleged should have been foreclosed by Chancery Court, is the deliberate contract of the parties and the law by which the collection of the indebtedness therein secured should be collected, and there is no law that would require a *cestui que trust* to go to the expense of filing a bill in chancery to foreclose that which the parties to a contract had expressly said should be foreclosed in another way, to wit: by public sale by the trustee, and if there be circumstances under which parties interested in or parties to a deed of trust can compel a foreclosure by bill in chancery, this rule or privilege only extends to such parties, and cannot be a cause for a third party to set aside a sale made in pursuance to the terms of the trust deed.

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The record shows that appellee H. J. Duke testified at length, and exhaustively and minutely explained every transaction with which he was connected. Mitchell and Carr, in their answer to appellant's cross-bill, deny every allegation of fraud or badge of fraud charged against them, and that, too, in language so strong and unequivocal that there is no room for construction as to its meaning, and this answer is sworn to by them or one of them, and under the statute an answer sworn to is evidence and throws the burden of overcoming it on the opposing party. Again, that answer is sworn to by them, and in it every allegation of fraud is minutely denied and that, too, in the very strongest terms. What more could they do by testifying? By their answer they have certainly testified as strongly and clearly as they could possibly have done by deposition. If the appellee wanted to cross that testimony or wished explanations in regard to same, why did it not introduce them for that purpose as it did H. J. Duke? The appellees were present all the while, and were ready to testify at any time the appellant might see fit to call on them.

Appellant asserts that it should be a presumption against the appellee because they did not introduce James H. Barr as a witness. This is certainly asking the court to carry presumption to an extent hitherto unknown. J. H. Barr had nothing to do with the transactions in these cases excepting advancing the money to Henry Duke for Mrs. McCaw, and drawing up the trust to execute same, and then afterward selling the land as trustee in said trust deed. After the sale, and after every transaction which culminated into the title of H. J. Duke had transpired, then it was that he was retained as the counsel of H. J. Duke in these matters. No professional confidence sealed his lips in favor of Duke against the appellant — he was equally accessible to appellant as a witness as he was to H. J. Duke or to Mitchell and Carr. Besides, when the charge was made in cross-bill of appellant that J. H. Barr had been retained by Duke in order to prevent him from testifying, the charge is not only emphatically denied by H. J. Duke in his answer thereto, but in his answer he expressly tenders J. H. Barr to appellant as a witness with the privilege of examining him fully not only as to all within his knowledge prior to the sale and his retainer by Duke, but as to everything pertinent to the case that he had since learned as the special counsel of H. J. Duke. Yet in the teeth of these facts and when H. J. Duke's case stood intact before the court, and when the appellant had wholly failed to

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establish a *single charge* of *fraud,* want of consideration, or inadequacy of price, this court is asked to construe it as a *conclusive presumption* of fraud against Duke, because, forsooth, he does not introduce a witness whom he does not need and whose testimony could only be accumulative on a point against which there is no testimony. I have learned from the law-books that when a charge of fraud is made it must be proved or abandoned — but opposite counsel is reversing the rule and asking this court to hold that a charge of fraud carries with it the conclusive presumption of its truth and cannot even be overcome by uncontroverted proof to the contrary.

There is one point that was raised in the lower court and there relied on which is not referred to specially in the assignments of errors, and that is that the trustee, Huntington, had no power to sell under that trust because in the printed part of the trust it reads that he shall "enter into and take possession of said real and personal estate," etc., when in fact he did not enter into the possession of said land. This point has already been considered, but, in addition, the proof shows that the lands sold by Huntington were all wild lands excepting two pieces, and they were not occupied by the debtor or his legal representatives, but if at all occupied they were occupied by a renter, and the proof does not show this only by inference. Consequently the trustee could not have entered into the possession of said wild lands, and it would have been morally impossible for him to have *entered* into the possession of the two pieces which the proof shows had some cleared land upon them, and at the same time and for these reasons the requirements would fail and be of no effect. Again, the cross-bill of appellant charges that B. F. Duke, the executor, had a full knowledge of all these sales, and if he did, and made no objection to them, then all irregularities are waived by him which he had a right to do, and it does not give the right to any one not a party to the trust to urge these irregularities, if they were irregularities, as a reason for setting aside such sale. See authorities *supra,* 24 Miss. 681; 52 Miss. 374; 2 Perry on Trusts (3d ed.), § 602dd.

OPINION.— COOPER, C. J., delivered the opinion of the court:

The facts of the case, as far as they are necessary to be stated, are that one Henry Duke died in July, 1882, the owner of a large tract of real estate and of considerable personalty. By his will,

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he appointed one B. F. Duke executor, charged his whole estate with the payment of his debts, gave his executor plenary powers to sell any property necessary to be sold for the payment of debts, and after giving some lands to be selected by the executor to certain old family servants, made his executor and appellee H. J. Duke residuary legatees and devisees of the remainder of his estate. The executor was relieved from the obligation of giving any bond; the estate was heavily in debt, was probably insolvent at the death of the testator, and is certainly now in that condition. On the 1st of August, 1881, the appellant obtained a judgment in the Circuit Court of Pontotoc county against the said H. Duke, which was enrolled on the 9th day of that month; some payments were made on this judgment in 1881, but there is a large balance due and unpaid. After the expiration of more than a year from the death of the testator the appellee procured an order from the circuit judge of the district in which Pontotoc county is included, under which he sued out his execution and levied it upon the lands in controversy in this suit as it is provided may be done by section 751 of the Code of 1880. The appellees thereupon exhibited this bill seeking to enjoin the sale under execution upon the ground that it would cast a cloud upon his title.

The title of complainant asserted in the bill is derived as follows: On the 12th day of May, A. D. 1881, Henry Duke executed a deed of trust to one Barr, trustee, to secure a debt of $2,800 to one Mrs. McCaw. The complainant having purchased the note, secured thereby after the death of the maker, caused the land to be advertised and sold by the trustee and became the purchaser at such sale of a large part thereof. As to the other parts of the land, the history of the title is this: In 1880, Henry Duke borrowed from one Mitchell the sum of $1,500, for which he executed his promissory note with the complainant and B. F. Duke as sureties. It appears also that Henry Duke had been executor to the will of the father of the complainant and as stated by complainant, who testifies as a witness, he as such executor conveyed to complainant certain lands which it was supposed was a part of that estate, but the title thereto having failed, the said Henry Duke undertook and promised to pay to the plaintiff the value of the same. This supposed obligation, added to the amount of the Mitchell debt, made the sum of $2,350, and on the 20th day of September, 1880, Henry Duke executed his note for that sum payable to the com-

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plainant, due May 1, 1882, and to secure the same executed a deed of trust upon his personal property, consisting of horses, mules, cattle, hogs, goats, etc. On the 11th day of July, 1881, to further secure complainant, because of his liability on the note to Mitchell and also to secure a note of that date for the sum of $707.96 (which was given for a balance of account due by Henry Duke to H. J. Duke), Henry Duke executed another deed of trust whereby he conveyed to one Huntington, trustee, certain other of the lands in controversy with power to sell the same upon default in the payment of the debts secured. The trustee, in May, 1883, proceeding under this deed, sold the lands thereby conveyed and at this sale the complainant became the purchaser of the greater part thereof; one Carr purchased some of the lands at this sale, but in consideration of the payment to him of about $50 transferred to complainant his bid and he received a title from the trustee. We may here state that in May, 1882, Henry Duke, to secure a debt of $286.43 and also to further secure the note of $2,350 of date September 20, 1880, executed another deed of trust to Huntington, trustee, whereby he conveyed all his crops of cotton to be grown during the year 1882 and also all cotton which should arise to him from the rents of his other lands. The complainant, stating thus his title to the lands, sought to enjoin the execution sale and for that purpose exhibited the original bill in this cause, on which an injunction was granted and served. The appellant, in response to this bill, filed its answer, which it made a cross-bill and attacked the validity of the sales under which complainant had purchased. The title derived under the sale made by Barr, trustee in the deed given to secure the debt to Mrs. McCaw, is assailed by the allegations that the complainant had possessed himself of the personal estate of the testator and realized therefrom the money by which payment was made in the purchase of the note from Mrs. McCaw. It is also charged that the sale was not fairly made, that the complainant had concealed from the defendant the fact that the sale had been advertised by the trustee for the purpose and with a view of bringing about the sale in the absence of the defendant's agent and attorney, in order that he might buy in the property at much less than its real value. That in fact this was done and the property sacrificed. The evidence in this branch of the case shows that a short time before the sale, one Young, the attorney of the appellant, applied to an agent

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of Mrs. McCaw's who had the note due to her, for collection, and requested him to give notice to the bank if a sale should be advertised under that deed, and that the agent promised to comply with this request. It is also shown that at about the same time the attorney made the same request of the complainant, who made no response to the request. A few days after this the complainant purchased the note from Mrs. McCaw's agent, and in the conversation then had with him suggested that "he did not want his business affairs made public," or words to that effect. Soon after this purchase the sale was advertised by complainant and on the day fixed the trustee appeared and sold the lands. There is nothing in the record supporting the allegations of the bill that the funds of the testator were used by the complainant in making the purchase of the note from Mrs. McCaw. In the absence of such proof, we see nothing in the conduct of the complainant which invalidated the sale under this deed. He owed no duty to the defendant, who was a judgment creditor of the testator with a lien upon the lands subordinate to that of the trust deed. The defendant was not only charged with constructive notice of the contents of this deed, but seems to have actually known the powers thereby conferred upon the trustee. The debt secured was unquestionably due, the method for giving notice was expressly provided, and no creditor or other person interested was entitled to any other notice. The complainant had not agreed to give any information on the subject and though it may be true that he derived and expected to derive a benefit by the ignorance of the defendant of the day of sale we can see nothing in this nor in the fact that by reason of such ignorance he actually got the advantage of buying the property at less than its true value which should invalidate his purchase.

So far, therefore, as the decree sustains the purchase thus made it meets with our approval, is and will be affirmed.

We come now to a consideration of the facts disclosed in reference to the sale under the deed of July 11, 1881, in which Huntington was the trustee. It will be noted that in all the deeds of trust given to secure the various debts to H. J. Duke, the indebtedness to Mitchell of $1,500 was secured. It entered into the note of $2,350, given in September, 1880, and this note was again secured by the deed of May 12, 1882. Duke testifies that it was the $1,500 referred to in the deed of July, 1881, under which the land was sold. In addition to this debt, there was secured by the

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deed of July 12, 1881, the further sum of $707.96 and by the deed of May 12, 1882, the further sum of $286.43, together with $750 for advances to be thereafter made to Henry Duke during the year 1882. The total indebtedness, exclusive of the sum to be advanced and of the sum which Henry Duke assumed to pay by reason of the failure of title of some lands which he as executor of H. J. Duke's father had set apart to H. J. Duke, was $2,694.39 and interest thereon. Adding interest to these debts to December, 1882, at which time the first payment was made to him by his executor, and assuming that the whole of the $750 contracted to be advanced had in fact been advanced, it will appear that the total amount due (exclusive of the obligation for the amount assumed for the failure of the land title) was about the sum of $3,900, and this sum is within $100 of the amount alleged to have been due by the answer to the cross-bill.

We are at a loss to determine upon what theory H. J. Duke asserted or Henry Duke admitted any liability on his part to account to H. J. Duke for a failure of title to lands which he had received from his father's estate. Certainly the promise to pay sum sum was *nudum pactum* and fixed no obligation on him to do so. We have, therefore, dismissed that sum from consideration. By the accounts rendered by H. J. Duke and filed as exhibits to his testimony and by his testimony it is shown that before the sale by Huntington, trustee, there had come to the hands of H. J. Duke from the proceeds of the mortgaged crops and personalty the sum of $3,641.61 and after the sale of the lands (in December, 1883) he received the further sum of $958 from a sale made under the deed of September, 1880, of personal estate thereby conveyed. In explanation of these payments the complainant testifies that a large part of these credits were applied to the payments of accounts created by the executor after the death of the testator and of debts due by tenants of the testator of which he or the executor had assumed payment. These appropriations should not have been made. It would be unjust to the defendant, a judgment creditor having a lien upon the lands of the testator subordinate to that given to the complainant by his deed of July, 1881, to permit the executor to divert the proceeds of the mortgaged personalty to the payment of unsecured debts, leaving the mortgage to operate on the lands to the exclusion of the subordinate lien.

The record is full of suggestions that this was an attempt by

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the executor to favor his brother, the complainant, at the expense of other creditors. We find that the complainant having bought a part of the lands under one of the sales on which rents were due for the year 1883 divides the rents received with the executor, on the theory that he being a residuary legatee and devisee was entitled to such participation. That a nonresident executor of an insolvent estate acting under a will which relieved him from giving any bond can, by any such arrangement with a secured creditor, extend the security over the whole estate by agreeing to a misappropriation of the proceeds of the mortgaged property, cannot be tolerated. According to the showing made by the complainant, there was but little if anything due him at the date of the sale under the deed of trust of July, 1881. At that sale he became the purchaser of a large body of land, which a proper application of the payments made to him would have freed from liability to his claim under the deed and subjected to the judgment sought to be enjoined. It would be inequitable to permit him to enjoy the fruits of his own wrong to the exclusion of another creditor equally meritorious and having priority of right under the law.

The decree must, therefore, be reversed in so far as it dismisses the cross-bill in reference to the relief sought against the sale under the deed of July 11, 1881. That sale is vacated and annulled. The court below will direct a proper account to be stated, applying the credits derived from the mortgaged property to the payment of the debts secured by the several mortgages. The property will then be sold under the direction of the court. If anything remains due to complainant, he will be entitled to priority or satisfaction. The remainder must be applied to the judgment of the appellant. In taking this account, no allowance should be made for the sum ($850), agreed to be paid by Henry Duke for the failure of title of the lands which descended to the complainant from his father.

Decree *reversed.*

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HILL, FONTAINE & CO. v. BLOOM, GOLDSMITH, TACHAN & CO.

Federal Court — Removal of Causes from State Court.

Where a cause has been removed, on petition, to the Federal court and by that court remanded to the State court, and the question of the right of removal is left in doubt, the action of the Federal court in remanding the cause will be accepted as correct.[1]

Attachment — Plea in Abatement — Power of Court to Permit Amendment after Demurrer Has Been Sustained.

The proper judgment when a demurrer to a plea in abatement has been sustained is *respondeat ouster*, but the court has power to permit the plea to be amended, and it should be exercised in a proper case, but the court must be informed of the nature of the proposed amendment, and why the plea was not made sufficient in the outset.[2]

Same — Motion to Quash.

Where the affidavit for an attachment substantially complies with the statute a motion to quash is properly overruled.[3]

2

On sustaining a demurrer to a plea the judgment should be *respondeat ouster*. Douglass *v.* Hendricks, Walk. 230; Southard *v.* Bowles, Walk. 325; Beatty *v.* Harkey, 2 S. & M. 563; Heyford *v.* Miss. Union Bank, 7 S. & M. 434; McMillan *v.* Causey, 43 Miss. 227.

But when a demurrer to a plea in abatement is sustained the judgment is *respondeat ouster*. Kendrick *v.* Watkins, 54 Miss. 495.

Upon sustaining a demurrer to a plea a failure to render judgment *respondeat ouster* is palpably erroneous, but the Supreme Court will not reverse for that, if the merits of the case were litigated and the judgment correct. (Lee *v.* Dozier, 40 Miss. 477, explained.) Wilkinson *v.* Cook, 44 Miss. 367.

If a demurrer to a plea be sustained judgment must be *respondeat ouster*, although there be another plea on file on which issue is joined. Drane *v.* Madison Co., 42 Miss. 264.

Unless the defendant obtain leave to plead over. Tittle *v.* Bonner, 53 Miss. 578.

3

A substantial, not a literal, compliance with the statute is all that is required. Wallis *v.* Wallace, 6 How. 254.

A creditor asked a justice of the peace to prepare papers for an attachment against his debtor, telling him the amount of the debt and the grounds of attachment; and the justice wrote an affidavit, bond, and writ, and handed them to him, asking "if that was all right," and the creditor answered that it was. The affidavit was not signed, and no oath was administered or attempted to be administered. *Held*, there was no affidavit, and the levy

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Statement of the Case.

Attachment by appellees, Bloom, Goldsmith, Tachan & Co. against L. H. Jones; plea in abatement by appellants, Hill, Fontaine & Co., intervening creditors of L. H. Jones. From verdict and judgment for plaintiffs in attachment defendants appeal. Affirmed.

Appellees, Bloom, Goldsmith, Tachan & Co., sued out a writ of attachment against L. H. Jones in the Circuit Court of Lee county. Appellants, creditors of Jones, under the Act of 1884, page 76, intervened by plea in abatement. They also petitioned for a removal of the cause to the Federal court. The petition for removal was denied.

Plaintiffs demurred to the plea in abatement and the demurrer was sustained, and the court refused to allow defendants to amend the plea. Defendant made a motion to quash the attachment, which was overruled. Final judgment was then rendered against Jones.

The following is the affidavit for writ of attachment objected to:

AFFIDAVIT FOR ATTACHMENT.

STATE OF MISSISSIPPI, }
Lee County. }

This day personally appeared before me the undersigned Mayor of the town of Baldwyn, S. M. Taylor, agent and attorney of

based thereon was invalid, and no subsequent amendment could validate the proceedings so as to affect intervening rights. Carlisle *v.* Gunn, 68 Miss. 243, 8 So. 743.

Where an affidavit for attachment was read over by the justice of the peace to affiant, who, when asked by the justice if he would swear to it, said that he did, and both thought that this was all that was necessary to complete the oath, it is sufficiently formal and valid, although the signature of affiant was never affixed to the affidavit, nor that of the justice of the peace to the jurat. So held on an application to amend. Dunlap *v.* Clay, 65 Miss. 454, 4 So. 118.

In an affidavit for attachment it is error to allege several grounds disjunctively, but such a defect is amendable. Bishop *v.* Fennerty, 46 Miss. 570.

An affidavit in attachment may be amended, even after appeal to the Circuit Court, by permitting the officer to subscribe his name to the jurat. Boisseau *v.* Kahn, 62 Miss. 757.

An affidavit for attachment is void, which stated no grounds whatever for the issuance of the writ; and all proceedings based thereon, including the writ and the levy thereunder, and a replevy bond given by the defendants, are absolutely void. Wood *v.* Bailey, 77 Miss. 815, 27 So. 1001.

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Bloom, Goldsmith, Tachan & Co., of Louisville, State of Kentucky, who makes oath that L. H. Jones is indebted to the said firm of Bloom, Goldsmith, Tachan & Co., in the sum of fourteen hundred fifty-one and 55/100 dollars, and that said L. H. Jones has assigned or disposed of or is about to assign or dispose of his property or rights in action, or some part thereof, with intent to defraud his creditors, and prays an attachment against the said L. H. Jones.

S. M. TAYLOR,
Agent and Attorney.

Sworn and subscribed before me this 24th day of January, 1885.

JNO. D. NORMON,
Mayor of Baldwyn.

APPEALED from Circuit Court of Lee county, J. W. BUCHANAN, Judge.

Affirmed February 15, 1886.

Attorneys for appellant, H. M. Hill and J. A. Blair.

Attorneys for appellee, Allen & Robins.

Brief of J. A. Blair:

This case is identical with that of Bamberger, Bloom & Co. *v.* L. H. Jones, Hill, Fontaine & Co., appellants.

The questions are: First, Did the court err in refusing the petition for removal. Second, or in sustaining the demurrer to the plea in abatement. Third, or in refusing leave to amend the plea in abatement.

I respectfully call the attention of the court to the modest brief in Hill, Fontaine & Co. against Bamberger, Bloom & Co., for my brief in this case, and thus avoid vain repetition.

Brief of Allen & Robins:

The questions raised in these three cases are very much the same, the main questions being identical.

The first error assigned in each of the cases is that the court erred in refusing to remove the causes to the United States court

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at the instance of the appellants, who were intervening creditors under the Act of 1884.

We think that an examination of this statute will satisfy the court that the two courts, the Circuit Court below and the United States court, were right in denying this application. * * *

As to the correctness of the judgment of the court below in sustaining the demurrer we have no doubt. Whenever a creditor disposes of his property to defraud his creditors he subjects himself to atttachment, and it is not a question of which creditor he was trying to defraud. Drake and Bump both state this principle in explicit terms.

The other question raised is the refusal of the court to allow the intervening creditors to amend the plea in abatement after the demurrer has been sustained to it. This court has settled the question too often as to what judgment the court must render on sustaining a demurrer to the plea in abatement. It is not a plea that could be amended after the demurrer had been sustained and there is no notice given the court as to how they proposed to amend, and even if this court were to hold that they had the right to make a proper amendment, yet this court cannot undertake to say whether the amendment they proposed to make was such as to bring the merits of the controversy between the parties fairly to trial, for the court is not notified as to what amendment the court refused to allow them to make. The judgment in sustaining the demurrer was that the defendants plead to merits. This they declined to do; their plea in abatement was dead and could not be amended; the only effect of any amendment that could be made would necessarily make a new plea and be a violation of the long-established rule of pleading that there shall be only one plea in abatement allowed. * * *

The affidavit for attachment does not follow the statute strictly. We submit, however, the affidavit is good and a substantial compliance with the statute, but if we are wrong in this it is not a defect of which the intervening creditors can take advantage. Their position in the case does not allow them to take advantage of that. * * *

OPINION.— PER CURIAM:

After an exhaustive examination of the multitudinous decisions of the many Federal courts on the removal of causes from State

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courts, we are left in doubt on the question of the right of removal in these cases (except as to one in which the right did not exist for want of the diverse citizenship required) and accept as correct the view of the United States court in remanding to the State court.

The demurrer to the plea in abatement was properly sustained. The power to permit a plea in abatement to be amended exists and should be exercised in proper cases, but we are not willing to reverse a judgment merely because of its denial, when not informed of the nature of the proposed amendment and why the plea was not made sufficient at the outset, or why the demurrer was not confessed and leave to amend sought without waiting the judgment of the court upon it.

On sustaining a demurrer to a plea in abatement, the proper judgment is *respondeat ouster*. The party may be allowed to amend, but presumably the action of the court below is correct, and he who complains of it must show the contrary. This is not shown in these cases.

The motion to quash the attachment in one of the cases was properly overruled. The affidavit was a substantial compliance with the statute, and that is all that is required. Had it been defective it would have been amendable, and we do not perceive that the mover could have taken anything by the motion.

Affirmed.

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Statement of the Case.

MARGARET ERSKINE *v.* F. A. FORBES et al.

Mortgages — Purchase Money Notes — Vendor's Lien — Subrogation.

Appellee filed both an original and a supplemental cross-bill. In In the first he claimed that his mortgage, though executed by E. alone, was valid because mortgagor was owner of the land. By the second he insisted that Mrs. E. could not enforce the payment of purchase-money notes given by E. for the land, and which were valid in the hands of A. & Co. by transfer from E., on the ground that Mrs. E. was the real purchaser of the land in controversy, and for this reason the purchase of said notes by her from A. & Co. operated as a payment thereof against her intention. *Held*, that if, as between Mrs. E. and appellee, she was the real owner of the land, then appellee acquired no right by mortgage executed by E. alone, and appellee is entitled to no relief under his cross-bill.

Same.

If, on the other hand, Mrs. E. was not the owner of the land, but had only an equitable right as against her husband, E., and was not bound for the payment of the notes given for it, she had the right to enforce vendor's lien, and such right was superior to appellee's mortgage. *Held*, that appellee could not say Mrs. E. was not the owner and thus make his mortgage good, and, having sustained this position, then say that she was not always owner, and thus convert her intention to purchase the notes secured by vendor's lien into a payment for appellee.

1

A lien for the purchase money expressly reserved in a conveyance of land is in effect an equitable mortgage, and an assignment of the debt carries with it the lien. Kausler *v.* Ford, 47 Miss. 289; Moore *v.* Lackey, 53 Miss. 85.

Where an express lien on land is reserved in a note for the purchase money, though the deed recites payment thereof, the lien will pass by assignment of the note. Hobson *v.* Edwards, 57 Miss. 128.

Where the vendor of land, by title bond, assigns the debt the lien passes to the assignee, and the vendor cannot afterward do any act which will affect it. Mhoon *v.* Wilkerson, 47 Miss. 633; Moore *v.* Lackey, 53 Miss. 85.

Under section 1124, Code 1880, providing that the assignee of a claim for the purchase money of land may enforce the vendor's lien as the vendor could, where by the contract it is agreed that payment of the purchase price shall be made to another than the vendor, such other becomes the payee of the purchase price, and may enforce the lien. Bank *v.* Knapp, 61 Miss. 485.

A cross-bill may be predicated upon separate and independent matter if it grow out of the same subject-matter involved in the original bill. Dewees *v.* Dewees, 55 Miss. 315.

For other annotations in this case, see brief for appellant.

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The record in this case begins with cross-bill of John Erskine, which stated substantially as follows:

That on November 21, 1876, T. H. and J. M. Allen & Co. and Geo. W. Arnold, executor of Julia F. Perry (lately Julia F. Locke), executrix of A. J. Locke, deceased, and Wm. D. Perry, her husband, and A. G. Smith filed their original bill against Forbes, Fitzpatrick, and Pittman and alleged that said executor and executrix and Smith sold certain lands to one Erskine, giving him a bond for title conditioned to convey the land on payment of two notes for $2,265.75 each, dated May 22, 1872, and due January 1, 1873, and January 1, 1874, respectively. That complainant took possession of the land and was in possession when cross-bill filed.

That there was due January 1, 1873, on the first note $294.72, the second note being unpaid. These two notes were transferred to T. H. and J. M. Allen & Company. That a deed was afterward made to Erskine by said Arnold et al., and that Erskine failed to pay the notes. That on May 16, 1876, Erskine conveyed to one Pittman said land to secure the payment of a debt due Forbes and Fitzpatrick, and that they took with notice of the prior lien. That on December 2, 1876, Erskine filed his answer to said original bill, admitting the debt to Forbes and Fitzpatrick, and the conveyance, but denied that a good title passed. That no effort was made by said Arnold, Smith, and Locke to make a good title; and that his improvements amounted to $3,000, and that he had paid taxes amounting to $2,500 and that about $7,500 had been paid on the purchase money, the latter being paid with the separate means of Mrs. Margaret Erskine with the distinct agreement with vendors that the title was to be made to her; that she was a necessary party to the suit, and that an action of ejectment was about to be brought for part of the land by the heirs of one Wiley Davis; that the deed tendered by the bill did not convey a good title and was not a warranty deed; that part of the land was entered by one Wiley Davis and sold by his administrator to Greenwood LeFlore and Nathan Hooker, and that said LeFlore conveyed his one-half interest to the heirs of Allen Sharkey, and that Greenwood Sharkey, the sole heir of Allen Sharkey, conveyed his interest in said land to complainant, Erskine, and that $12,000 of the purchase money remained unpaid; that a bill was filed to subject the land to the payment of the unpaid purchase money, and that said land was sold under a decree of court to satisfy such

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claim, and that the said Smith and Locke purchased at this sale, and afterward conveyed to cross-complainant as stated; that Hooker's one-half interest did not appear to have been conveyed and still remained the property of the heirs of Hooker; that the said Smith and Locke covenanted to give a warranty deed to cross-complainant, and that no such deed had yet been tendered, and that unless a valid conveyance be made, then the trade should be rescinded and cross-complainant's purchase money, taxes, and improvements be refunded to him; that Forbes and Fitzpatrick had, besides the lien on the land, a lien on certain mules and horses which latter security ought first to be exhausted, and that if this could not be done cross-complainant was willing that they be paid out of the money refunded to him by vendors.

That Smith and Locke were insolvent, and that if the bond for title could be found (it not being produced and could not be found) it would be worthless. There was prayer for account and rescission, and that the sum found to be due be enforced by vendor's lien, and a conclusion for general relief.

Smith, Arnold et al. filed answer to the cross-bill and averred that the deed tendered conveyed good title; that no ejectment had been brought; denied that Wiley Davis never parted with title; denied improvements; alleged that the whole title to the land was in Greenwood LeFlore since 1848, and that by adverse possession the title was good. Denied that LeFlore filed a bill against the land, but said that a decree of sale was rendered by the United States Court in Bankruptcy against Erskine and his assignee, conveying all the interests of Sharkey and Erskine, and that at the sale Smith and Locke purchased for $10,000, and that Smith and Locke afterward sold to Erskine, and that the deed tendered to him conveyed a good title. Denied that the heirs of Nathan Hooker had any interest in the land, but that Hooker conveyed the land to LeFlore; that the heirs of Wiley Davis had no title to the land. Alleged that in 1866 part of the land was sold to the State of Mississippi for taxes; that in 1871 Locke and Smith bought from the State, and again did so in 1872. Answer denied that the purchase money was paid by Mrs. Erskine with the understanding that the title was to be made to her. Alleged that in June, 1877, Lambkin and Eggleston recovered a judgment against Erskine for $3,220.33, and that at the same time there was suit pending against him for some $2,000 by the Metropolitan Bank, as well as other suits against cross-complainant; that the Lambkin

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and Eggleston judgment was set aside and cause continued, but that at the December term, 1878, another judgment was rendered against Erskine for $1,909, and that other judgments for $2,000, $399.25, $356.30, and $379.35 were rendered against him.

Averred that Arnold and Julia F. Perry were fully authorized by the will of A. J. Locke to convey title to Erskine, but that since the removal of the said Julia F. Perry, the remaining executor did not have the power to make a new deed. Denied that Erskine was entitled to a rescission of his contract. Averred that they knew nothing of the amount due Forbes and Fitzpatrick. Concluded by asking dismissal of the cross-bill.

Eugene A. Forbes, sole owner of the securities described, answered and said:

He admitted all the allegations of the original bill; that on May 16, 1876, Erskine owed respondent and Fitzpatrick $1,989.59 and gave his note for same, payable March 1, 1877; that at the same time Erskine owed a mortgage debt to Lehman, Abraham & Company, secured by said land; that Forbes and Fitzpatrick agreed to take up this mortgage to the amount of $2,000 and advance supplies, which, with the debt due them made the total sum due $4,500; that to secure this sum Erskine gave a mortgage on the land in controversy to S. B. Pittman, as trustee, under date of May 16, 1876; that on November 24, 1876, Erskine made another mortgage on his crops to secure $1,000. There were certain credits, leaving balance due Forbes of $2,389.91. Respondent prayed that his answer be made a cross-bill for the purpose of enforcing his mortgage and making all parties defendants.

Erskine filed an answer to Forbes' cross-bill and set up a long and detailed statement of the accounts between himself and Forbes and Fitzpatrick, in which statement much of the debt was disputed.

The mortgage to Forbes and Fitzpatrick embraced the homestead, the conveyance of which was not joined in by Mrs. Erskine. Answer prayed that the homestead be exempted.

After all these proceedings there was an amended and supplemental answer and cross-bill of Forbes, reciting (after setting out the previous proceedings) that since the filing of the original cross-bill John Erskine had died; that when Erskine took the title bond on contract of sale from Locke and Smith, it was understood that the purchase was made for the use of Mrs. Erskine; that the purchase money then paid was the money of Mrs. Erskine; that it was understood (but outside of the written con-

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tract) between John Erskine and Locke and Smith that when paid for the land was to be conveyed to Mrs. Erskine.

That all the improvements were paid for with Mrs. Erskine's money, and that these statements were made in the answer of John Erskine.

That on June 27, 1877, John Erskine conveyed this land to A. McK. Kimbrough, as trustee for his wife, and made subject to the unpaid purchase money; that this deed was recorded; that since the filing of the original cross-bill Mrs. Erskine has paid the amount of purchase money due to Locke and Smith, who have no longer any claim, and that the original bill was not prosecuted for their benefit but for Mrs. Erskine's benefit; that Mrs. Erskine claimed that, by virtue of her payment to the complainants, she became entitled to their lien and became entitled to the notes of Erskine, and to have a decree rendered in her favor and stand in the place of Locke and Smith, the complainants. Respondent and cross-complainant claimed that Mrs. Erskine was the real owner of the land, as before stated, at the time the money was paid to complainants, and that her payment operated as a satisfaction and extinguishment of the debt, and that Mrs. Erskine could not assert any claim against the land in conflict with Forbes' mortgage, nor superior thereto. All the original parties, as well as Mrs. Erskine, were made parties defendant. There was prayer that the lien for the purchase money be canceled and that Forbes' mortgage be declared a first lien on the land.

Mrs. Erskine demurred to this amended cross-bill, which presented the question as to whether she, by operation of law, lost her money by paying the amount of the lien due to the complainant, or was entitled, as she claimed, to subrogation to the rights and lien of Locke and Smith.

This demurrer was overruled, whereupon there was appeal to the Supreme Court.

APPEALED from Chancery Court, LeFlore county, R. W. WILLIAMSON, Chancellor.

Reversed, demurrer sustained, and bill dismissed.

Attorney for appellant, Frank Johnston.

Attorney for appellee, J. L. Harris.

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Brief of Frank Johnston:

Mrs. Erskine's equity to be substituted to the incumbrance she has bought in, I submit, is very clear. She did not owe the debt to Locke and Smith, or to T. H. and L. M. Allen. And, morever, she is under no sort of personal liability, express or implied, for its payment. The statement in the deed to her trustee that the conveyance was subject to the vendor's lien imposed no kind of personal liability on her, though it bound the land. But the land was already charged with this lien, and if the conveyance had been silent on this subject, still the land would have gone to Mrs. Erskine under her deed still charged with the lien. So that the recital or statement in the deed did not change the status of the property or the lien from that which would have been given it by the law in the absence of all stipulation. In a word, Mrs. Erskine took the land under her deed charged with the lien for the purchase money. And, therefore, between her and Allen & Co. the land was bound to the latter under their vendor's lien.

But Forbes had a *second* mortgage. He voluntarily accepted it, with full knowledge of the first lien. He, therefore, could never reach the land until the first incumbrance was paid off, and moreover this was his attitude and this the extent of his equities and rights when the bill was filed, and when he answered. He had a perfect right to redeem the first incumbrance, or to take the surplus of the proceeds of a sale after payment of Allen's claim, and he has precisely both these rights at this moment.

There is no pretense that Mrs. Erskine's own money was not paid to Allen & Co., and the position of Forbes is that this use of Mrs. Erskine's money, when she did not owe him a cent, and when she is under no obligation to Allen & Co., or liable in any way for that debt, and under *no obligation to Forbes* to pay off and *discharge* the first incumbrance, has actually canceled the first incumbrance and gives him a first mortgage.

In Ross *v.* Wilson, 7 S. & M. 766, the principle I contend is one applicable to the case at bar was decided. There, Brown, Wood & Co. owed W. B. Ross $6,000, and Andrew Wood, one of the firm, gave his note for the debt with Gary & Doyle as sureties. Wood then conveyed certain property by way of mortgage indemnity to Gary & Doyle in respect to the Ross debt, as well as to secure to Doyle a debt of $2,000 due to him. Woods then sold the property to Wilson, who paid the debt to Doyle, taking his interest in the mortgage. It was decided that Wilson was to be

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substituted to the rights of Doyle and should share *pro rata* in the mortgage security. It will appear, of course, that Wilson bought the property charged with the mortgage.

The court said in Staples *v.* Fox, 45 Miss. 667, that whenever a party has such an interest in property as makes it incumbent on him to get in an outstanding claim or equity for its protection, good conscience dictates that he shall have all the rights which the holder of the equity had. 45 Miss. 667.

And it was held that a vendor's lien may be the subject of equitable substitution. 45 Miss. 667; Kleson *v.* Scott, 6 Dana, 137; Bank *v.* Chrisman, 3 B. Mon. 50.

It is true that one party cannot make another involuntarily his debtor. It is said as to one party volunteering to pay the debts of another. But another class of persons who buy in incumbrances are entitled fully to subrogation, viz.: those who buy in an outstanding claim or equity for the protection of their rights in the property. In such cases the party advancing the money may be placed in the shoes of him whose claim or equity has been paid off. Staton *v.* Alcorn, 51 Miss. 72; Story on Equity Jurisprudence, § 1227.

So a purchaser at a void foreclosure sale whose money has been applied to the mortgage becomes the equitable assignee of the mortgage. Clark *v.* Wilson, 56 Miss. 753.

The very case is put in Staples *v.* Fox, of a purchaser on a subsequent incumbrance from the vendee discharging a vendor's lien. 45 Miss. 681.

If Mrs. Erskine owed Forbes the debt he claims, it would be different. Nor is she under any duty to him to pay off the Allen incumbrance, nor was she under any personal liability to pay the notes given to Locke and Smith. But because she has invested her own means, in this vendor's lien debt, Forbes asks that her money be confiscated or applied to his use. Forbes' rights have not been interfered with, and his equity remains unaffected. He has precisely the same rights and the same security now that he had before the property was conveyed to Mrs. Erskine. He stands just where he placed himself when he voluntarily took a second mortgage for $4,500, except that one of the vendor's lien notes was paid down to about $300, and about half of his own debt has been paid by Erskine.

There is no privity between Mrs. Erskine and Forbes, and there is no theory on which he can appropriate her money.

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Erskine bought in his own name, and the contract of sale was *that title was to be made to him.* He gave his own two notes for the purchase money. The deed that was made by his vendors was to him.

The deed from Erskine to Mrs. Erskine's trustee recites that it was understood between Locke and Smith and John Erskine that the title would be made to Mrs. Erskine, and that John Erskine used Mrs. Erskine's money in making payments on the first note.

But Mrs. Erskine never had a contract of any kind with Locke and Smith, and there is nothing to show that she authorized this use of her money. The extent of her participation was to take a conveyance of this land, incumbered by the vendor's lien, and also by this large mortgage to Forbes and Fitzpatrick. There is nothing in this to impose a personal liability upon her in respect to either debt, and absolutely nothing to impress upon her the obligation of paying off Allen & Co. for Forbes' benefit. There was nothing to prevent her from buying in this first incumbrance. It would be absurd to say that it has injured Forbes.

The cross-bill set up the new and distinct matter of having the first incumbrance canceled, and it also made a new party to the cause, Mrs. Erskine. In both respects it offended the rules of pleading.

In Clark *v.* Wilson, 56 Miss. 753–756, it was said that a new and distinct matter could not be introduced into a cause by cross-bill. That was where a party bought at a void mortgage sale and filed an original bill.

New and distinct matter not embraced in the original suit cannot be introduced by a cross-bill or made ground for relief. Gilmer *v.* Felhour, 45 Miss. 627; Thomasson *v.* Neely, 50 Miss. 310.

A cross-bill is really a defense to the original suit. Story on Equity Pleading, § 399.

And cannot introduce new and distinct matters. Story on Equity Pleading, § 401; Daniel on Chancery Practice & Pleading, page 1548, and note 2 on page 1549.

On both these propositions I respectfully submit that the decree of the chancellor should be reversed and the amended cross-bill of Forbes dismissed.

Brief of J. L. Harris:

The only question for the consideration of the court is whether the purchase was a *payment* or otherwise. The general rule is

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that where the owner of the equity of redemption buys in a mortgage it will be regarded as a payment where he was under obligations to pay the mortgage debt, but otherwise it will not be a payment and the mortgage can be kept alive.

If a man buys mortgaged property and agrees, as part of the consideration, to pay the mortgage debt, payment by him operates as a discharge of the mortgage, whether he takes an assignment of the mortgage, an acknowledgment of payment, or a release. Or, if he owes the mortgage debt, the rule is, of course, the same.

A difficulty arises frequently in determining what words will create a personal liability to discharge the mortgage debt. It seems that where the purchaser buys "subject" to the mortgage, without other words, that does not obligate him to pay it, and in such case he can take a transfer. The courts say that the use of this word alone may have had no other purpose than to protect the grantor from the penalties imposed by statute in case of failure to apprise the grantee of the existence of an incumbrance, or to prevent the grantee from impeaching the validity of the mortgage upon the property, or it may have had a purpose other than fixing upon the grantee a personal liability to pay the debt.

In Libbins *v.* Hall, 29 Barb. (N. Y.) 529, the court say that to create such liability either the language of the deed should be "subject to the payment" of the outstanding mortgage, or that "it forms a part of the purchase money which the grantee in the deed assumes to pay," or some equivalent expression which clearly imports that an obligation is intended to be created by one party and is knowingly assumed by the other. But the court also holds that the parties may speak not only by the terms of the deed, but by circumstances of the transaction and the language of their acts.

The language of the deed here is as follows: "This conveyance to be subject to the unpaid purchase money for said land under the contract originally made by me," etc. When this language is considered in connection with the circumstances of this transaction, which we will note more fully hereafter, and the relations of the parties and the interest of the grantor, it would seem to warrant the construction for which we contend. 1 Jones on Mortgages, § 856.

But however this may be, this case should be affirmed upon the familiar rule that a mortgage will not be kept alive in aid of a fraud or wrong. Although in equity a mortgage may be kept alive when this is requisite to the advancement of justice, this is never allowed when the result will be, through the forms of law,

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to aid in perpetrating a fraud or an injury. 1 Jones on Mortgages, § 863; McGiven *v.* Wheelock, 7 Barb. (N. Y.) 22; Worthington *v.* Morgan, 16 Sim. 547.

The court will bear in mind that the appellant received all the benefit of the debt contracted by her husband with appellee, and *in equity* is as much bound to discharge the mortgage as he himself would have been. The fact is admitted by the demurrer and by acceptance of the deed from John Erskine that Margaret Erskine was the real purchaser, and her husband's name was a mere blind, and in such case she was always personally bound to pay the Allen & Co. note, and, if so, she could not keep a transfer and keep them alive, but her purchase was in law a payment.

If she had been *sui juris* under no disability, this would undoubtedly be so, but being a married woman, she could not buy real estate on credit and make herself liable personally, and, therefore, was never personally liable for the purchase money represented by the Allen notes.

But the answer to this is that a purchase by a married woman is only voidable not void. She may make the payments and complete the bargain. The contract is binding on her vendor. She cannot keep the land and not pay for it.

If she does pay and complete the bargain, she pays in pursuance of her bargain when she bought, which was not void, and constituted an equitable obligation that she comes fairly within the rule *in equity* that one under contract to pay a mortgage debt cannot take a transfer and keep it alive against subsequent incumbrances. See Nicholson *v.* Neiderhoff, 50 Miss. 56, as to the nature of a purchase by a married woman on credit.

OPINION.— COOPER, J., delivered the opinion of the court:

By his original and supplemental cross-bills the appellee, Forbes, attempted to deal with the land in two antagonistic characters. By the first he claims that his mortgage, though executed by Mr. Erskine alone, is valid because Mr. Erskine was the owner of the land mortgaged. By his supplemental cross-bill, he insists that Mrs. Erskine cannot enforce the payment of the notes given in purchase of the land by Mr. Erskine, and which were confessedly valid in the hands of Allen & Co., on the ground that she was the real purchaser of the land, and for this reason the purchase of the notes by her from Allen & Co. operated as a payment thereof against her intention. The answer to these propositions is that

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if, as between herself and Forbes and Fitzgerald, Mrs. Erskine was the real owner of the land, then they acquired no right by the mortgage executed by Mr. Erskine, and Forbes is entitled to no relief under his cross-bill; if, on the other hand, Mrs. Erskine was not the owner of the land but only had an equitable right as against her husband, and was not bound for the payment of the notes given for it, she has the right to enforce the vendor's lien and it is superior to the mortgage of Forbes. In other words, Forbes cannot say that she is not the owner and, therefore, his mortgage is good, and having sustained this position, say that she was not always owner and thus convert what was intended by her as a purchase of the notes secured by the vendor's lien into a payment for them. The demurrer should, therefore, have been sustained and the supplemental cross-bill dismissed.

The decree is reversed, demurrer sustained, and supplemental cross-bill dismissed.

A. M. BOWEN et al. *v.* T. C. DUNCAN et al.

Injunction — Answer of Defendant Not Evidence.

The answer of the defendant to a bill to enjoin the sale of property is not evidence, and, even though it states a good defense, the injunction should not be dissolved unless there is competent evidence to support the answer.

Same — Estoppel.

The mere receipt by the grantor in a deed of trust of rents for eight months on the property after it is sold under the deed of trust, and bid in by the grantee therein, does not estop him to claim that the bid should inure to the payment of the debt secured, when it is not shown that he had knowledge of the purpose of the purchaser to abandon the purchase.

In December, 1881, T. C. Duncan sold A. M. Bowen 100 acres of land in Mississippi for $800, to be paid in four annual installments of $200 each. Bowen executed four notes for the purchase

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Statements in a sworn answer directly responsive to interrogatories in a bill are to be accepted as true unless disproved. Fulton *v.* Woodman, 54 Miss. 158.

Where a bill to quiet title calls on defendant for discovery as to the muniments of his alleged title, an unsworn answer setting up a tax sale is not evidence thereof. Bank *v.* Railway Co., 72 Miss. 447, 17 So. 7.

In an answer which admits the allegations of the bill, averments as to

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money, and to secure same gave a deed of trust on the land bought, and also gave a deed of trust to secure it on a house and lot in Memphis, Tenn. The first note was not paid and the Tennessee property was advertised for sale under the deed of trust and at the sale Duncan bid $1,000 for it, and it was sold to him at that price. Duncan afterward had the trustee in the deed of trust of the property in Mississippi advertise that property for sale to satisfy the debt secured by it when Bowen filed his bill in this case to enjoin the sale and seeking to compel Duncan to comply with his bid on the Memphis property and appropriate the $1,000 to the payment of the debt. The injunction was granted as prayed. Duncan answered the bill, setting up as a defense that the taxes on the Memphis property, at the time of the sale, amounted to more than the $1,000 he bid, and that the bid was made with the understanding that at least a part of the amount bid should be applied to the payment of the debt. Some affidavits were taken to substantiate this allegation, but they were suppressed on motion of complainant. The defendant made a motion to dissolve the injunction which was heard on bill, answer, exhibits, and affidavits, and the injunction was dissolved. From the decree dissolving the injunction and allowing damages to the defendant complainant appeals.

APPEALED from Chancery Court, DeSoto county, J. G. HALL, Chancellor.

Reversed and remanded, January 25, 1886.

Attorneys for appellant, Powell & Buchanan.

Attorneys for appellee, A. M. McKenzie.

Brief of Powell & Buchanan:

The answer of appellees filed in the court below claims that the taxes on the Memphis property at the time of sale, at which Dun-

affirmative matters not responsive, but by way of avoidance, are not evidence. Hence, where distributees of the estate of a wife allege that defendant, her husband, appropriated the personal estate of the wife, and has not accounted therefor, if he admits this, an averment in the answer that his wife gave him her estate, not being responsive, is not evidence. Dyer *v.* Williams, 62 Miss. 302; Parmele *v.* McGinty, 52 Miss. 483; Park *v.* Bamberger, 52 Miss. 565; Rodd *v.* Durbridge, 53 Miss. 694.

See also authorities cited in the brief for appellant.

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can bought, amounted to more than his $1,000 bid. There is no proof in the record to sustain this allegation. 'Tis true the deposition or affidavit of Handwerker was taken on this point, but the same was by the court on the hearing suppressed for want of proper notice, and there is no appeal from the order suppressing same on the part of appellees. Some exhibits, letters, etc., were also made to the affidavit of T. C. Duncan, but all of them and all Duncan said on said point was likewise suppressed, from which no appeal was taken by appellees.

The bill set up the sale of the Memphis property and the fact that Duncan bid on it $1,000. The answer admitted the sale and admitted the bid, but as matter in avoidance set up that the taxes due on the land at day of sale amounted to more than the bid, and that the bid was made subject to the agreement that the $1,000 was not to be paid if the taxes on the land amounted to that much. These facts were not responsive to the bill, and before dissolving the injunction strict proof of them should have been required. "Defendant can take no advantage of new matter alleged in his answer unless he prove it *aliunde*." Wofford *v.* Ashcroft, 47 Miss. 645; Parmelee *v.* McGinty, 52 Miss. 483; Park *v.* Bamberger, 52 Miss. 569.

"Where facts in avoidance and not in response to the bill are set up in the answer, they must be proven. The answer is evidence only when it is responsive to the bill." Brooks *v.* Gills, 12 S. & M. 438; Miller *v.* Lamar, 43 Miss. 383.

Thus if the bill charge that the defendant executed a bond and the answer set up payment, that allegation must be proven. Nichols *v.* Daniels, Walk. 224.

"When the bill charged that the transfer was made unconditionally but did not call for any discovery as to its terms, and the answer denied this charge and then set up the terms and conditions of the transfer, it was held that the statement as to the the terms, etc., were not responsive to the bill and not evidence." Dease *v.* Moody, 31 Miss. 617.

On this point we call attention to the further fact that the bill of complaint in this cause specially waived the answer under oath thereto and in no event could the allegations of said answer be considered as evidence. Code 1880, § 1874.

The burden of proving new affirmative matter set up in the answer and not responsive to the allegations of the bill is upon the respondent. Osborne *v.* Crump, 57 Miss. 622.

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The rule that an injunction will be dissolved upon motion when the equities are distinctly denied by a sworn answer, is subject to the exception of cases where serious or irreparable injury would be done to the complainant by a dissolution of the injunction, while that to the defendant would be slight and easily recompensed. Jones *v.* Brandon, 60 Miss. 556.

The brief filed for appellee does not allude to the fact that the affidavits of Handwerker and Duncan were suppressed, and for the sake of argument we will consider that the same had not been done and yet maintain our right to the relief prayed for in our bill or to enough relief to show the error of the court in dissolving the injunction. Handwerker's affidavit shows that on April 15, 1885, the taxes on the lot amounted to $2,205.36. Of this amount only one-third was due on the interest in the house and lot which Duncan purchased. This would amount to $735.12, to which we may add $40, amount of costs of court, and the total is $775.12, lacking $224.88 of being as much as the bid of Duncan, $1,000. The answer of Duncan also sets up an agreement at the time of the sale that the taxes on the property were to be paid, else he would not be held to comply with the bid. This statement, however, Duncan's own affidavit denies, for he tells us that he never had any other understanding with Bowen than that which the trust deed shows, and that he never had any agreement with reference to the taxes with the commissioners who sold the land. The terms of the trust deed on the subject of taxes are so vague that the conclusion is not justified which is assumed in the answer. We contend that Duncan was bound to take notice of every incumbrance on said property and bought the same clothed by law with full knowledge of the full amount of taxes due. Bowen's interest was sold, and the only interest he had was what would have been due him after payment of the taxes if any then due. The fair presumption is that Duncan knew the amount of the taxes and the value of the land, and that his bid of $1,000 meant that he assumed payment of the taxes and gave $1,000 for Bowen's interest in the property. If the above position is not correct, certainly there can be no doubt but that Bowen is entitled to a credit on his debt to amount, $224.88, which is the balance of the amount of his bid over the amount of taxes and costs. Now, Duncan in his affidavit admits that he has never put any such credit on the notes, and we contend that he should be compelled to do this before he is allowed to sell the

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land in Mississippi for the procurement of the balance due him on Bowen's debt, after said $224.88 is credited.

The theory upon which this bill was filed was the inherent jurisdiction of the Court of Chancery to enforce and compel the performance of specific contracts and to administer relief in all cases of trusts. When Duncan elected to institute proceedings in the Chancery Court of Shelby county, Tenn., and to bid $1,000 on the property of Bowen, the latter acquired certain equitable rights hereinbefore indicated which the Court of Chancery alone could enforce.

In Mount *v.* Brown, 33 Miss. 566, the court held that if the vendee at an administrator's sale or auction sale refuses to complete the sale by giving bond and security as required by the terms of the Code, the administrator may resell and hold the purchaser for the diminution in the price brought by the property on a resale.

Brief of D. M. McKenzie:

The bill of injunction did not exhibit the trust deeds sought to be enjoined, nor the proceedings in Tennessee, and no allusion is made to the controlling clause in said trust deeds, which provides for the payment of all taxes due on said properties as well as all other costs out of the proceeds of said property when sold, and the careful suppression of said agreement as to payment of taxes, and costs, as well as said debts contained in said trust deeds, misled the court or chancellor when the injunction was issued.

If Bowen had filed with his bill a true copy of said trust deed and failed to state that his Tennessee property sold for enough to pay all taxes and costs due from said property as well as the amount of the said notes, the chancellor would certainly have refused the injunction asked for. And this fact is proved by the prompt dissolution of the injunction when the facts of the case appeared on the hearing. The pleadings and proof and exhibits in the record shows that Bowen bought land from Duncan wholly on credit, Duncan taking a trust deed on the property he sold, and on some other property as collateral or additional security, which is the usual course in such transactions in Mississippi. The trust deeds provided for the payment of all taxes due on the property conveyed, and for all other costs of every character which should accrue in the matter, as well as for the debts due Duncan. It shows also that in Duncan's proceeding to collect out of the Ten-

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nessee property conveyed in said trust the taxes and costs due on or out of such property amounted to more than the value of Bowen's said property, and that no money could be got out of such property for said debt, and said proceeding was abandoned, and Bowen has the same right to it now that he had before said proceeding; and in fact, although he now asserts that his said property was sold in May, 1884, and he knew of such alleged sale, he regularly collected his rents out of said property, until in January, 1885, he thought of trying to keep Duncan out of possession of the property for which Bowen had never paid one cent, for another year, he having already occupied the land for three full years without the disbursement of one cent of his money.

Bowen's action in collecting rent estops him from saying that Duncan bought and owns said property. Duncan authorized a bid to be made for him on it for its full value if clear of taxes, but as said bid was only contingent on the property yielding some money to go on his debt after paying out of the proceeds of the sale all taxes and costs due on the land, but on Duncan's ascertaining that the taxes due on said land amounted to more than its value, and, therefore, that nothing could be got out of it for his debt, he abandoned said proceeding.

Appellant's counsel argued before the chancellor that the amount of the taxes and costs due from said Tennessee property was less than $1,000, and that Bowen should have credit on said notes for the difference between the amount of such taxes and costs — about $777 — there made such charges, and the $1,000 bid by Duncan conditionally for such property, and that Duncan should be charged with said Tennessee property. This charge comes late from Bowen, who collected rents on the property as his own for eight months after the time he says Duncan bought it. And again, inasmuch as said trust deed expressly provided for the payment of all taxes and other costs due on said property, as well as the said Duncan debt, and careful investigation shows that his said property, even at the price of said bid, is not worth as much as the taxes and costs due on it, it is difficult to see how Bowen can be hurt by *not selling* said property.

The chancellor was satisfied by the pleadings and proof that Duncan's effort to collect on his debt through said Tennessee trust deed resulted only in trouble and expense, and that no money was received by Duncan from that source and that he cannot be

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charged with any, and that Bowen's said notes should be paid or the property for which they were given subjected to their payment, as provided in the trust deed, the execution of which was enjoined, and dissolved the injunction.

Bowen's bill, asking that his debt due for the land on which he has paid nothing should be declared satisfied, and that the injunction restraining Duncan from executing the trust deed given to secure payment for said land, issued in this cause, be made perpetual, is grossly iniquitous and cannot prevail in the courts of Mississippi.

Duncan's answer with the exhibits therewith, and his affidavit and exhibits, shows this case fully and fairly, and the decision of the court below is right.

OPINION.— CAMPBELL, J., delivered the opinion of the court:

It appears that Duncan caused the property in Memphis to be sold, and bid for it $1,000 at the sale. Afterward he abandoned his purchase, but fails to show a state of case entitling him to do so. His claim is that the amount of his bid is appropriable to the payment of taxes due on the property, and that nothing is left to go as a credit on the notes, but there is in the record no evidence of taxes due on the property, or of other circumstances giving Duncan the right to subject the land in Mississippi notwithstanding his bid of $1,000 for the lot in Memphis. This answer is not evidence, and the only evidence he offered on this point was suppressed. It is shown that after the sale of the lot in Memphis, Bowen continued for eight months to collect rent for it as he had done before, but it is not shown that he had knowledge of the purpose of Duncan to abandon his purchase and acquiesced in his course or in any way precluded himself from holding him to his bid. The mere receipt by Bowen of rent after the sale of the lot was not an estoppel to him to claim that Duncan's bid should inure to the payment of the notes. We think it quite probable that a condition of things existed which made the receipt of rent by Bowen amount to acquiescence in the course pursued by Duncan, and it is true that no part of the $1,000 bid by Duncan will be left after paying taxes and costs, or little of it, but on the presentation by the record before us the injunction should not have been dissolved.

Reversed, injunction reinstated, and cause remanded.

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MAYOR AND ALDERMEN OF THE CITY OF VICKSBURG v. G. L. RECORD.

Supreme Court Practice — New Trial — Presumption in Favor of Correctness of Judgment of Lower Court.

The city of Vicksburg contended that a certain street was forty-five feet in width; appellee contended that it was thirty feet in width. The original plat of the subdivision containing this street made by Pinckard was never recorded, but a subsequent plat made by one Williams, and certified to by Pinckard, was filed for record, and on this plat the width of the contested street is given in writing as thirty feet. The other evidence was conflicting. *Held*, that if the plat was not competent evidence the judgment of the circuit judge was not shown to be clearly wrong on the other facts of record.[1]

The mayor and board of aldermen of the city of Vicksburg sued George L. Record for a strip of land twelve feet eleven inches wide at the west end, and thirteen feet seven inches wide at the east end, alleged to be a part of Veto street, within appellee's enclosure, on the North end of square 7 of that part of the city of Vicksburg known as "Pinckardia."

Appellant claimed that Veto street was forty-five feet wide, while appellee alleged it to be thirty feet in width. On January 23, 1834, one Pinckard purchased that tract of land west of Washington street in the city of Vicksburg and south of the then southern boundary of said city, and on April 14, 1835, he pur-

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The action of the court below is presumed correct, unless error is made manifest by the record. Byrd's Case, 1 How. 162.

This rule is of universal application with reference to courts of general jurisdiction, and recognized in every other court; and there can be no reversal unless the record show error affirmatively. Grant *v.* Planter's Bank, 4 How. 326; Harris *v.* Newman, 5 How. 654; Briggs *v.* Clark, 7 How. 457; Abbott *v.* Hackman, 2 S. & M. 510; Ross *v.* Mims, 7 S. & M. 121; Green *v.* Creighton, 7 S. & M. 197; Long *v.* Shackleford, 3 Cush. 559; Steadman *v.* Holman, 33 Miss. 550; Pass *v.* McRea, 36 Miss. 143; Gale *v.* Lancaster, 44 Miss. 413.

The appellant or plaintiff in error must show clearly and affirmatively that there is error in the record, or the judgment will be affirmed. Fox *v.* Matthews, 33 Miss. 433.

He must put his finger on the error, as every presumption is to be indulged in favor of the judgment. Green *v.* Creighton, 7 S. & M. 197; Cox *v.* Cox, 8 S. & M. 292; Balfour *v.* Mitchell, 12 S. & M. 629; Ferriday *v.* Selser, 4 How. 506.

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chased a certain tract east of Washington street and south of said boundary, which latter tract included appellee's property. There was no dispute about the dedication of Veto street, but the controversy was as to the width of said street. Appellee claimed that if Veto street were forty-five feet wide west of Washington street, it did not follow that it was of the same width east of same, because, he alleged, Pinckard purchased the first tract more than a year before he acquired the second, laid it out into lots and streets, and sold parts thereof, and based this contention on a deed made by Pinckard on March 31, 1835, which made mention of a town laid out by him.

The testimony of appellant showed that Pinckard executed a deed to one Gillmore conveying square 8 of "Pinckardia," leaving a space of forty-five feet between said square and Gordon square; and that Veto street had always been regarded as being forty-five feet wide at that place by the Vicksburg & Meridian Railroad, which had owned said square 8 for a great many years. Further testimony of appellant showed that Depot street crossed Washington street at right angles, and that the distance from the northwest corner of Depot street and Washington street to the northeast corner of said square 8 was just 295 feet, which left Veto street forty-five feet wide; and that a line projected eastward from that point parallel with the north line of Veto street, which was a section line about which there was no dispute, would make Veto street north of appellee's property forty-five feet wide,

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The judgment of an inferior court is presumed correct in the high court, unless the record shows the contrary. Lee *v.* Bennett, 31 Miss. 119; Cason *v.* Cason, 31 Miss. 578.

This presumption exists wherever there is a possible state of facts which would justify the judgment. Duncan *v.* McNeill, 31 Miss. 704.

In a civil case, where there is such a conflict of evidence that the mind cannot repose with entire confidence upon a conclusion in favor of either party, a verdict will not be disturbed in this court, no error of law having intervened. Bank *v.* Moss, 63 Miss. 74.

A finding on controverted facts, though it may be unsatisfactory, will not be disturbed, if it cannot be said that there is no evidence to support it. Railroad Co. *v.* Doggett, 67 Miss. 250, 7 So. 278.

A verdict will not be disturbed unless it is manifest from the whole record that it is clearly wrong, or unless misdirection or other apparent error may have produced it. McAlexander *v.* Puryear, 48 Miss. 420; Buckingham *v.* Walker, 48 Miss. 609.

A verdict on conflicting evidence and supported by competent evidence is conclusive. Goodwin *v.* Mitchell, 38 So. 657.

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and would leave the strip of street sued for within appellee's enclosure.

There was much testimony on both sides (a reference to brief of counsel giving sufficient information of the respective contentions), when the court found the issue in favor of defendant, whereupon plaintiff appealed to the Supreme Court.

APPEALED from Circuit Court, Warren county, WARREN COWAN, Judge.

Affirmed, November 15, 1886.

Attorneys for appellant, Catchings & Dabney, and Birchett & Gilland.

Attorneys for appellee, McCabe & Anderson.

Brief of Catchings & Dabney:

The original plat of Pinckardia cannot be found, but the evidence of dedication is abundant.

The property known as Pinckardia appears on Winn's map of the city made many years ago, laid off into lots, squares, and streets, and it has been conveyed ever since by description based upon the platting as set out in that map. * * *

It is wholly immaterial, therefore, whether Pinckard bought and platted the property west of Washington street before he bought and platted that east of Washington street or not.

However this may be, it was platted and laid out and conveyed by him, according to one scheme, and it was all called by him "Pinckardia."

The numbering of lots and squares and the running of the streets is done according to *one* scheme only. * * *

If there were no other facts than these which I have commented on, it would be clear to all persons that Pinckard had dedicated Veto street to the public, and that it was to be forty-five feet wide.

The only thing to the contrary of this is a plat found on the records of Warren county.

This is clearly inadmissible as evidence. It purports to be a *part* only of the original plat of "Pinckardia." It is certified to

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be a correct copy of a part of the original plat by one Williams. Who and what he was does not appear. His certificate states that Veto street is thirty feet wide, and it is to prove the width to be thirty feet that this is introduced.

But this plat is not acknowledged by Pinckard or by anybody, and was, therefore, improperly recorded.

In fact, unless the plat was accompanied by a deed, or afterward to convey an interest to the public, it could not be lawfully recorded, even if it was acknowledged.

Our statute did not provide for the record of a simple map of lots.

This thing offered in evidence, therefore, is but a copy of a copy of a part of the original plat, even taking Williams' certificate to be true.

Pinckard's affidavit is meaningless and gives no right to the clerk to record it.

If we had the copy sworn to by Pinckard, it is doubtful if it could be put in evidence, but it is certain that the record of it cannot be.

Leaving this out, there is nothing to sustain the thirty foot idea at all.

Brief of Birchett & Gilland:

* * * If Pinckard's certificate is worth anything, it proves that the Gordon and Walker squares, west of Washington street, are a part of his one plat of Pinckardia. Consequently, Veto street, being between two parallel lines, must be of equal width at every point. * * *

Pinckard laid off "Pinckardia" into lots and streets in the latter part of 1835 or the first part of 1836, for he purchased that part east of Washington street in April, 1835, and by deed dated May 30, 1836, he conveyed the property now owned by appellee, describing it by its proper lots and square, by which numbers it has always been since conveyed until it came into the possession of Brown & Johnston, who resurveyed the same.

* * * But the objection is made that Veto street was originally dedicated only thirty feet wide, and the evidence of it is said to be a plat recorded on page 154 of Book "O" of the Record of Deeds of Warren county. The plat itself does not fix the width of Veto street or any other street, but a note appended to it by the

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aforesaid Williams pretends to testify to the width of the streets and the length and size of the squares, among which he recites Veto street to be thirty feet wide. The bare reading of the certificates must satisfy any candid mind that this plat was not made to fix the plat of Pinckardia, but was made by Pinckard to settle some existing dispute as to whether or not the Gordon and Walker squares were a part of Pinckardia. The plat there recorded does not purport to be the original, but a copy made by said Williams, and was made on December 30, 1839, nearly four years after Pinckardia was laid out, and appellee's property conveyed by Pinckard. * * *

The plat offered by appellee is not the original plat of Pinckardia, and was not acknowledged by Pinckard, and was, therefore, improperly recorded, and the record thereof is incompetent evidence. Without this plat and the statement of Williams there is no excuse for contending that Veto street is less than forty-five feet wide. The two systems, Pinckardia and Vicksburg proper, cannot be properly joined together without making Veto street forty-five feet wide, as it was laid out. * * *

Brief of McCabe & Anderson.

The pleadings and evidence in this case evolve for trial this single issue of fact, viz.: Whether Veto street, as originally laid out and dedicated to public use, was forty-five feet wide or not. Appellants, the mayor and aldermen of Vicksburg, who were plaintiffs in the court below, hold the affirmation of this issue, and appellee holds the negative. * * *

Now, after Pinckard bought, he caused a survey of the whole of his purchase, including the Vick plat, to be made, and a plat of the whole to be made, destroying the Vick plat, and named the survey in honor of himself, "Pinckardia," which name it bears till this day. When this plat was made, that is the precise day and year, has not been definitely ascertained. We know, however, it was made some time prior to May 30, 1836, for on that day Pinckard sold to Rappleys a part of that portion east of Washington street and described it by lots. This plat of Pinckardia was made then somewhere between the 31st day of March, 1835, and the 30th day of May, 1836, and was made at the instigation of Wm. M. Pinckard, who was at that time the owner of the property. In short, Veto street was dedicated by Pinckard

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and by no one else. No one else could have done it. Now, then, the question is, did he dedicate forty-five feet wide, as the plaintiffs claim, or thirty feet, as the defendants claim?

If we had the old plat, or, to state it more accurately, the original plat, the trouble would be solved; but that plat, for some reason, was never recorded and cannot now be found. So we are compelled to resort to the next best evidence. Subsequent to the making of said plat, a plat of Pinckardia was made and recorded. It is to be found in Book "O," page 154, Record of Deeds of Warren county, and a copy of it is in the record. This plat is the only one of Pinckardia in existence. It is the plat that all the surveyors had surveyed by for the past fifty-six years. It is the plat that people have bought by; have paid taxes by; have marked their lines and corners by for two whole generations. This plat, before it was recorded, was submitted to Pinckard, and he, not satisfied with certifying to its accuracy, went before a justice of the peace, Edward R. Warren, and *swore to it.* On that plat, which has been our guide, and only guide, for ages, just above Pinckard's affidavit is the statement in writing that Veto street is thirty feet wide. Why this statement and this map did not quiet the suspicions of Polk and Dabney as to the width of that street it is impossible to conceive. * * *

OPINION.— PER CURIAM:

If it be conceded that the copy of the plat of "Pinckardia," and the description of the property by J. W. Williams therewith connected, are not competent evidence, we are unable to say that the conclusion reached by his honor, the circuit judge, is clearly or manifestly wrong on the other facts of record.

Wherefore, the judgment is *Affirmed.*

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NEWT CAMPBELL v. STATE OF MISSISSIPPI.

Supreme Court Practice — Criminal Law — Verdict — Insufficient Evidence — New Trial.

A verdict will not be allowed to stand where there is palpable failure of the proof to sustain it. In such cases a new trial will be granted.

On Thursday morning, November 9, 1882, Henry White was found dead by the side of a road about three-quarters of a mile southeast of Eudora. His throat had been cut, a razor cover was found near the body, a hat and two sticks were also found lying near by.

On the evening before Henry White and a negro, identified as

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This court will not grant a new trial merely because the evidence preponderates against the verdict, if there be proof legally conducing to the verdict. Dickson *v.* Parker, 3 How. 219.

Unless it be clearly against the evidence, or the palpable preponderance of evidence. Bowers *v.* Johnson, 10 S. & M. 169; Elzy *v.* Stone, 5 S. & M. 21; Fisher *v.* Leach, 10 S. & M. 313; Harris *v.* Halliday, 4 How. 338.

But if the jury find against the great preponderance of evidence a new trial will be granted. Sims *v.* McIntyre, 8 S. & M. 324; McQueen *v.* Bostwick, 12 S. & M. 604.

And where there is conflicting evidence, and no instructions asked, the preponderance of evidence against the verdict must be great. Mann *v.* Manning, 12 S. & M. 615.

And a new trial will not be granted by the court merely because the verdict is against the preponderance of evidence, and a contrary verdict would have been more satisfactory, there being no positive evidence upholding it. Lea *v.* Guice, 13 S. & M. 656.

The question in such a case is not is the verdict clearly right, but is it manifestly wrong. Waul *v.* Kirkman, 13 S. & M. 599; Prewett *v.* Coopwood, 30 Miss. 369; Drake *v.* Sarget, 36 Miss. 458.

And the test is, is there sufficient evidence fairly to support the verdict. Guion *v.* Doherty, 43 Miss. 538.

It will not be granted in a case of conflicting evidence, where the mind cannot repose with entire certainty and confidence upon a conclusion in favor of either party. Watson *v.* Dickens, 12 S. & M. 608.

Where there is a conflict in the evidence, one part sustaining the verdict, and the other against it, a new trial will not be granted unless the verdict be very clearly wrong. Garland *v.* Stewart, 31 Miss. 314; Gay *v.* Lemle, 32 Miss. 309.

The preponderance must be very clearly against the verdict. Harris *v.* Halliday, 4 How. 338.

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being the defendant, were seen by several witnesses walking together toward Eudora, and both of them carried sticks. Evidence offered by defendant was that at about the time of the murder he was working on the steamer Dean Adams, plying between Arkansas City and Memphis, and that he had boarded the steamer on November 8th at Arkansas City, and that the steamer arrived in Memphis on the 9th.

George T. Smith, in rebuttal for the State, testified that the steamer passed Lambs Landing, south of Memphis, early in the morning of November 10th. A telegram from Memphis was introduced, showing the arrival of the Dean Adams there Friday morning, November 10th, between 9 and 10 o'clock.

Where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party the verdict will not be disturbed. Watson *v.* Dickens, 12 S. & M. 608.

A new trial will be granted where there is no evidence to sustain the verdict. Crocket *v.* Young, 1 S. & M. 241.

And so where the verdict, considered with reference to the issue submitted to the jury, is not sustained by the evidence. Otey *v.* McAfee, 38 Miss. 348.

A new trial will not be granted on the evidence alone, unless the verdict be opposed by a decided preponderance of evidence, or based on no evidence. Cicely's Case, 13 S. & M. 202; McMann's Case, 13 S. & M. 471.

And power to set aside on the ground that verdict is opposed by decided preponderance of evidence. McMann's Case, 13 S. & M. 471.

This is specially so in cases of circumstantial evidence. Browning's Case, 33 Miss. 48.

A verdict will not be disturbed unless it is manifest from the whole record that it is clearly wrong, or unless misdirection or other apparent error may have produced it. McAlexander *v.* Puryear, 48 Miss. 420; Pfeifer *v.* Chamberlain, 52 Miss. 89.

Reluctant as this court is to disturb a verdict upon the sole ground of the sufficiency of the evidence, where there is a palpable failure of proof to sustain the verdict, it will not be allowed to stand. Harris *v.* State, 71 Miss. 462, 14 So. 266; Monroe *v.* State, 71 Miss. 196, 13 So. 884.

This court, in passing upon the correctness of a conviction, does not weigh conflicting testimony, and it will not look further than to see whether the verdict is supported by competent and sufficient evidence. In this connection the approval of the verdict of the trial judge who heard the evidence is a fact to be considered. Logan *v.* State, 53 Miss. 431.

But a verdict will be set aside on consideration of the facts alone if they fail to sustain it. Monroe *v.* State, 71 Miss. 196, 13 So. 884; Harris *v.* State, 71 Miss. 462, 14 So. 266; Dobson *v.* State, 67 Miss. 330, 7 So. 327.

A conviction will not be disturbed merely because the jury might, without being censurable, have acquitted. Skinner *v.* State, 53 Miss. 399.

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From a verdict of guilty and sentence of life imprisonment defendant appeals.

APPEALED from Circuit Court, De Soto county, A. T. ROANE, Judge.

Reversed and remanded, January 26, 1885.

Attorneys for appellant, D. M. McKenzie, H. C. Watson, and J. W. Foster.

Attorney for the State, J. L. Harris.

Brief of H. C. Watson:

There is absolutely nothing to connect the man seen with White, the murdered man, on the evening of November 8th, with his murder. There is absolutely nothing to show that he was at the place of murder unless it be that one of the witnesses swears that two sticks were found near the body, and one of the witnesses who saw the two men before Eudora says that each of the men had a stick.

Presuming that the "sticks" found near the body were the same "sticks" seen in the hands of the two men before they reached Eudora, is it possible that any jury would be warranted in concluding that the man with Campbell committed the murder, and if the two had been attacked and the man with Campbell had run away, what is more natural than that he should have dropped or thrown away his stick. What more natural than that he, a stranger in a strange land, should have held his tongue in regard to the attack and murder, knowing full well that suspicion would attach to him and his account of the transaction not believed.

But if this circumstance alone is sufficient to show that the man with White on the road to Eudora continued with him past that place, turned off into the old road shown on the map in the record, and was present at the time of the murder and did the killing, the proof fails to identify the prisoner as the man with White.

The proof is overwhelming that he was not the man. It is impossible that the books of the Dean Adams should have shown that Campbell was at work on that boat on one-half of the day of the

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8th and the whole of the 9th of November and received his pay therefor, unless such had been the fact, to say nothing of the testimony of the two officers of the boat and one passenger.

Campbell stated at once, upon being arrested, that he was on the Adams at the time the murder was committed. The sheriff of the county wrote to the mate of the boat to find out about it. This fixed the matter on the mind of the mate.

The jury must have convicted upon the theory of the district attorney that the Adams was behind time on her way up from Arkansas City; that Campbell *jumped* the boat, and made his way across the country to Hernando, killing White on the way, took the train to Memphis, and arrived there in time to receive his pay. This theory involves the absurdity that the Adams made the run from Arkansas City to the landing opposite Eudora, 200 miles, in about one or two hours, and then running fifty miles to Memphis in two nights and one day.

The defendant shows by his affidavit, and from extracts from various newspapers, that it is a part of the public history that the Adams was behind on her trip down the river and not on her return trip, and proposed to show by creditable witness that these statements are true.

The murdered man, it is supposed, was killed with a razor. No razor was found on the defendant, nor any other deadly weapon. No blood was on his clothing or person.

Although tried in the committing court without counsel, surrounded by the family and friends of the murdered man at Eudora, near the scene of the murder, no expression of guilt escaped from him. No question to witness introduced against him betrayed him. During his long confinement in the jail no expression escaped him indicating guilt. Our knowledge of human nature and the history of criminal trials teach us that such things cannot be and the prisoner guilty.

Brief of D. M. McKenzie:

The evidence shows that on Wednesday, November 8, 1882, just before sunset, Henry White, accompanied by a colored man, was seen traveling on the Commerce road going east toward Hernando, and that early on the morning of the 9th, White was found near Dr. Richmond's house on the old Commerce road murdered, with his throat cut. The inference is that the colored

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man who was seen traveling with Mr. White, and who was not known by any one of the witnesses, who testify to seeing him, and who has not since been found, committed the murder. Newt Campbell, the appellant, was arrested in Memphis, Tenn., on the night of the 10th of November, 1882, and charged with the murder and convicted.

The evidence for the State in this cause was not sufficient to convict, even if no evidence was offered for the defendant, but when the defendant proves that he was on the steamer Dean Adams from the middle of November 8th and continuously until the night of November 9th, as is done by the "portage-book" of said steamer, and by the emphatic, positive, and unshaken testimony of Henry Powers, mate of said boat, and also of Henry Washington, a passenger, and Thomas Jefferson, captain of the watch on said boat, and the witness Ed. Campbell proves that he had called on him shortly before the arrest, and with witness Henry Washington, just off the Dean Adams, which arrived in Memphis on Friday, November 10th, between 9 and 10 o'clock A. M. It is clearly a case of mistaken identity, and the identification is made in every instance by witnesses who had but a passing glance at the man, and the only witnesses for the State who really had opportunity to identify him, that is, who were in his presence long enough to be able to observe and know him, to-wit, Winnie Miller and Ann Chalmers, with whom it is assumed the murderer stayed all night, who both testify that while Newt Campbell looks like the man who stayed with them, that they cannot swear that the prisoner is the man. But they do swear that the prisoner is the same man they saw tried in Eudora, showing that they were observing women and would know if the prisoner was the man who stayed with them.

No two or the witnesses agree in their description of the dress worn by the negro seen with White, yet all of them who testify to Newt's identity saw him on the same road, and within fifteen minutes of each other. The only reliable and trustworthy evidence in the record is that for the defense, and that is clear and conclusive, and the witnesses without suspicion of bias.

The charges of the court were disregarded by the jury, and the Supreme Court should either grant a new trial or discharge the prisoner absolutely. He is the victim of a desire to punish some one for a most atrocious murder.

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Brief of J. L. Harris:

The sole question in this case is as to the sufficiency of the evidence to sustain the verdict and this is submitted to the judgment of the court without argument.

OPINION.— PER CURIAM:

Repeated examinations of the facts disclosed by the record impress us with the conviction that another trial should be awarded to the accused. It is so ordered.

Judgment *reversed.*

ELIZABETH C. CRUM *v.* BENJAMIN W. BROWN et al.

Demurrer — Equities in Bill.

A bill charges the procurement of the transfer of property of A. by deed to B. to secure payment of bond of C. Said bond was vacated and B., attorney, holds the property for fee for services. The bill charges payment of part of the fee and offers equitable payment of balance. *Held,* that a demurrer thereto should have been overruled.[1]

Plaintiffs filed their bill in the Chancery Court of Alcorn county to vacate several certain deeds, filed and recorded in said county, alleging the following facts: Their son, L. G. Crum, had been indicted by the grand jury and remanded to jail, and upon trial by habeas corpus, his bond was reduced from $2,000 to $1,200, and, in order to make said bond, they deeded all of their

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D. having been arrested and imprisoned on a criminal charge, his mother and father, in order to procure his release from custody till the next term of the court thereafter, procured N. to become surety on his bond for appearance, and on the 15th of June, 1876, executed jointly a deed of trust on her lands to indemnify M. against any loss on account of the forfeiture of the bond. On the 16th of January, 1877, D.'s mother, Mrs. H., and her husband, for a valuable consideration, sold and conveyed the same land to C., who had notice, actual and constructive, of the existence of the trust deed for the benefit of M. D. failed to appear as required by his bond, a forfeiture was taken thereon, and M. had to pay the cost of the proceedings on the bond, though not the penalty thereof. He then caused the trustee in the deed of trust to advertise the land for sale to reimburse him for the costs thus paid out. C. filed a bill to enjoin the sale. M. answered, and proof was taken by both sides. On final hearing, the bill was dismissed. *Held,* that the bill

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land to Peter Crum, the grandfather of L. G. Crum, in order that said Peter Crum might be held harmless from any loss by reason of his signing the bond. Afterward the indictment was quashed and the sureties released. They had employed one G. S. Inge to defend their son, agreeing to pay him a fee of $100. That they turned over to said Inge a horse as part payment of said fee, said horse being worth $100. Shortly after the settlement of the suit a deed, purporting to have been made by plaintiffs and Peter Crum, was recorded, conveying all of the said lands of the plaintiffs, which included their homestead, stating a consideration of $1,000, none of which was ever paid them, and plaintiffs denied absolutely the signing of said deed; that they are illiterate, and the deed is not signed by "mark." This land was subsequently conveyed to several others, all of whom had notice of the facts recited. Plaintiffs ask for a cancellation of all deeds, with the exception of an eighty-acre tract which they are willing shall go to said Inge as additional attorney's fee. The bill was filed against B. W. Brown and Hiram Kennedy. A demurrer was filed, on the ground that W. M. Inge and G. S. Inge were not made parties defendant; that no knowledge is alleged that said Inge knew the land was held in part by Peter Crum, nor showing equity, or bad faith of said Inge; that if any trust in Inge was established by the facts set forth, it was a resulting trust and void under the Statute of Frauds; that Peter Crum is not a party defendant; that they are estopped by their action in conveying the land in fee simple to enable them to make the bond, because they cannot take advantage of their own wrong, which demurrer was sustained.

An amended bill was filed, joining Peter Crum, G. S. Inge, and

should have been maintained, and the sale perpetually enjoined. Mrs. H. had no legal authority to charge her separate estate to indemnify the surety on the recognizance of her son, nor can the deed of trust be maintained as a charge on her income upon the ground that it was executed for the debt of her husband. Chandler *v.* Morgan, 60 Miss. 471.

A married woman who, under the Code of 1871, gave, with her husband, a trust deed on a lot owned by her, to secure several debts, one of which was binding on her, cannot, several years after the trust deed is fully executed by a sale and purchase thereunder by the creditor without objection on her part, and when the property has greatly increased in value, maintain a bill to cancel and redeem, there being no unfairness, fraud, or inequitable advantage in the sale. (Chandler *v.* Morgan, 60 Miss. 471, the case of an unexecuted contract, distinguished.) McDougal *v.* Bank, 62 Miss. 663; Walker *v.* Ross, 65 Miss. 523, 5 So. 107.

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W. M. Inge, which was demurred to upon the same grounds as before. The second demurrer was sustained and the bill dismissed.

Plaintiffs appeal.

APPEALED from Chancery Court, Alcorn county, L. HAUGHTON, Chancellor.

Reversed, demurrer overruled, and remanded thirty days after mandate.

Attorney for appellant, W. H. Kilpatrick.

Attorneys for appellee, Nugent & McWillie.

Brief of W. H. Kilpatrick:

* * * Under these facts, which are confessed by the demurrer, was the conveyance of the 130 acres of land by the appellants to Peter Crum, Sr., valid? And did it work any divestiture of title? Surely not. It was not such an object for which a married woman could convey or charge her estate. Code of 1871, §§ 1778, 1779, 1780; Davis *v.* Foy, 7 S. & M. 64; Stephenson *v.* Osborne, 41 Miss. 119.

On this point, also, see the case recently adjudicated by this court, almost identical in the facts of it with the case at bar. Chandler *v.* Morgan, 60 Miss. 471.

It is respectfully submitted that the case last cited is decisive of the case under consideration. Indeed, the line of authorities on this point are numerous and unvarying in doctrine. Viser *v.* Scruggs, 46 Miss. 705; Klein *v.* McNamara, 54 Miss. 90.

But if it should be held that the conveyance of the land by appellants to Peter Crum, Sr., was valid, and such as a married woman could make under the law, then the facts of the case make Peter Crum the trustee of Elizabeth Crum, and all who hold under him, with a knowledge of the facts, take only such title in the land as he had. Let it be borne in mind that Peter Crum is not, and was not, in any sense the creditor of the appellants. They owed him nothing. He paid out no money for them on any account. Their son was in prison under a serious charge; they desired to effect his deliverance from jail. They were unable themselves to make the necessary bail bond. In

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order to enable Peter Crum to qualify and make the necessary bond, and save him harmless against a possible forfeiture of the bond, and any loss he might sustain by it, Elizabeth C. Crum, the mother, conveyed her homestead to him for that purpose, and that purpose alone. Leonard Crum, the son, was released by the judgment of the court, and Peter Crum relieved of any loss or danger of loss. In good conscience, he ought then to have reconveyed the land to appellant. He acted otherwise. His vendees and subvendees knew the conditions of the conveyance to him and stand in his shoes, and cannot plead that they are innocent purchasers without notice. They are the trustees of the appellants. In Freeman *v.* Wilson, 51 Miss. 329, on page 333, the learned judge who delivered the opinion of the court very lucidly announces the true doctrine on this subject in the following language; he says: "It is now well-settled doctrine in courts of equity, that they will examine into the true character of a conveyance which, on its face, *imports an absolute title,* and will give it effect, as contemplated by the parties, to be ascertained by their contemporaneous and subsequent conduct." And again, "mortgages may not only be created by the express deeds and contracts of the parties but they may also be implied in equity, from the nature of the transactions between the parties." 2 Story Equity Jurisdiction, § 1020; Perkins *v.* Gibson, 51 Miss. 699–705; Gladney *v.* Barton, Id. 216; Cameron *v.* Lewis, 56 Miss. 76; Klein *v.* McNamara, 54 Miss. 90.

A trust results to the appellants. Flynt *v.* Hubbard, 57 Miss. 471–474; Taylor *v.* Moseley, 57 Miss. 544–547; Klein *v.* McNamara, 54 Miss. 90–102; Jones *v.* McDougal, 32 Miss. 179; 4 Kent's Commentaries, top pp. 330–335, and notes.

Brief of Nugent & McWillie:

The cases cited as showing want of capacity on the part of Mrs. Crum to make the conveyance to Perter Crum have no application to the facts of this case at bar. That conveyance was an absolute deed expressing a large money consideration paid in cash, and was not a mortgage. A married woman had at the time under the laws of this State the right to sell and convey her property although she could not incumber it save for specific purposes. In this case, she did sell and convey it by an absolute deed under circumstances disclosed by the bill, that now estop her

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from setting up her disability. It appears that the conveyance was made in order to invest in Peter Crum the fee simple title to sufficient property to enable him to qualify as surety on the bail bond of his grandson, the son of appellants, and to hear now her plea of her incapacity to make the deed would be allowing Mrs. Crum to take advantage of a fraud practiced on the Circuit Court, or rather the State, whose criminal laws it sought to vindicate. The deed was executed in due form and all the advantage obtained that could follow an absolute investiture of title in Peter Crum, and to countenance or recognize the defense now set up would violate the most well-established maxims of the law and lead to the most abominable consequences.

But treating the conveyance as an incumbrance even, subject to defeasance, we are by no means sure that the contract was one beyond the capacity of a married woman under the authorities cited and the terms of our statute. The boy was one of her family. Was the fee paid to save his person from incarceration within the class of "necessaries" included by the act? We would certainly hesitate to deny it. The statute evidently contemplates all these things necessary for the well-being of the family apart from luxuries and articles of display, and, extending to the education of the children, shows that the legislative intent was not confined to mere victuals and clothes. * * *

The trust sought to be established in the lands is not an implied trust. The bill sets up an express trust resting on the verbal promise of the grantee, and it is not averred that any fraud was contemplated at the time of the making such promise. The subsequent conveyance by the grantee is alleged to be fraudulent, but is not sufficient in the case of one who relies on a verbal promise. The promise must have been fraudulently made for the purpose of obtaining the title, and constitute the first step in a preconcerted plan of deceit. Pomeroy on Equity, § 139.

The agreement relied on is manifestly within the Statute of Frauds. The trust does not arise from the transaction necessarily for the execution of the bond, apart from that money expressed in deed, afforded a consideration, and the trust arises from the agreement and being purely verbal is within the Statute of Frauds. Miazza *v.* Yerger, 53 Miss. 139; Rutland *v.* Brister, 53 Miss. 683.

If we admit though that such trust can be shown, the bill is still demurrable for it is not averred that the Messrs. Inge had

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notice of it. The allegation on this subject is that they knew that the "conveyance was made solely for the purpose and to the end that said Peter Crum was to be protected from any loss or liability he might sustain by reason of his becoming the surety of the said L. G. Crum, and for no other purpose whatever."

There is nothing in this of knowledge on their part that Peter Crum was to reconvey or hold the title for the benefit of the grantors, and, in fact, nothing inconsistent with the idea of an absolute grant. They may have known all that is averred and yet thought that the deed was without verbal conditions. An absolute conveyance was as efficacious to protect the grantee as a defeasible one, and certainly Peter Crum and his grantors had the right to bargain for an absolute conveyance in consideration of his assumption of liability on the bond, and certainly the instrument itself shows that such was the fact. * * *

OPINION.— COOPER, J., delivered the opinion of the court.

The demurrer should have been overruled. Chandler *v.* Morgan, 60 Miss. 470.

Decree reversed, demurrer overruled, and defendant allowed sixty days in which to answer after the mandate shall have been filed in the court below.

D. A. OUTLAW et al. *v.* THOMAS H. MAYO.

Abatement Act — Liquidating Levee Board — Sheriff's Sale — Commissioner's Sale.

Where lands were sold by the tax collector under the Abatement Act, on May 10, 1875, and the same lands wer sold to the liquidating levee board, on May 10, 1870, and conveyed by the liquidating levee commissioners to the purchaser of May 10, 1875, on February 10, 1879, *held* that such conveyances are good against a subsequent transfer at an administrator's sale.

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Sales under the Abatement Act did not pass merely the title held by the State under a prior tax sale, but, in addition, conferred a new title by virtue of the proceedings under that act. Cochran *v.* Baker, 60 Miss. 282.

The validity of sales under the act is not dependent upon the regularity of the last assessment or of the levy for the year 1874. The act adopted the

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Statement of the Case.

Bill in chancery by Thomas H. Mayo against D. A. Outlaw et al. seeking to set aside a certain conveyance of lands made by Gwin and Hemingway, commissioners of the liquidating levee board and to cancel cloud upon complainant's title.

From a decree for complainant there was appeal to the Supreme Court.

The substantial averments of the bill are as follows: Complainant alleged that in the year 1869 he recovered judgment against one Joseph W. Field for $503.92, and that *nulla bona* execution was returned thereon. That subsequently Field died leaving an

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assessments in the various counties and the levy of taxes as then fixed as establishing the valuation of land and the rate of taxation, and had the effect to cure all irregularities or defects in such assessment or levy arising from the nonperformance or irregular performance of any act which the Legislature might constitutionally dispense with. Cochran *v.* Baker, 60 Miss. 282.

Hence, the fact that the levy in case of the original sale was excessive, or was made at the wrong place, does not affect the title to land sold under the Abatement Act. Chambers *v.* Myrick, 61 Miss. 459.

Where land held by the State under a previous tax sale was sold for liquidating levee taxes in 1870, the latter sale was void. Ricks *v.* Baskett, 68 Miss. 250, 8 So. 514.

Lands delinquent were to be sold on the second Monday of May, and a sale after the first day, but before the second Monday of May, was void. The days intervening were intended to be days of grace to the taxpayer, and no final default could occur until the later date. Davis *v.* Schmidt, 68 Miss. 736, 10 So. 64.

By section 1 of the Act of 1888 (Laws, p. 40), deeds of conveyance from Gwin & Hemingway, commissioners in the case of Green and Gibbs, in the Chancery Court of Hinds county, are made *prima facie* evidence that the lands embraced therein were duly sold to the board of levee commissioners. As to these lands, this statute obviates the necessity of the production of the deed or list of lands originally sold by the tax collector. Patterson *v.* Durfey, 68 Miss. 779, 9 So. 354.

One claiming under such deed must point out the particular title which the State claimed, and in aid of which the presumption is invoked. He cannot, by merely averring generally the title in the State, devolve on his adversary the burden of showing the negative fact that no tax sale was ever made to the State. Bank *v.* Railway Co., 72 Miss. 447, 17 So. 7.

And the *prima facie* effect of a deed from the Auditor is overcome, where the only evidence of title in the State is a list of land sold to the State in 1875, certified by the Auditor, and it nowhere appears that the list was ever filed by the tax collector with the chancery clerk, and it is not certified by the tax collector as required by section 1698, Code 1871. Bank *v.* Railway Co., 72 Miss. 447, 17 So. 7.

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insolvent estate with two minor children. That J. H. Field, a son of decedent, was appointed administrator. There being no personalty, administrator procured an order from court to sell certain lands located in Sunflower county to pay debts of the estate. That said lands were purchased by complainant at administrator's sale for the sum of $1,400, and his title thereto confirmed, in May, 1879. That said lands were sold in May, 1870, to the liquidating levee board for taxes due said board for the years 1867, 1868, and 1869. That complainant was ignorant of such a condition until after his purchase of said lands, when one Outlaw informed him

Section 578, Code 1880 (Code 1892, § 498), authorizing the filing of bills to confirm tax titles, applies to every variety of such titles. Chrisman v. Currie, 60 Miss. 858.

It applies to levee tax titles, a levee district being "a district" within the meaning of the first section of said act. Belcher v. Mhoon, 47 Miss. 613; Metcalf v. Perry, 66 Miss. 68, 5 So. 232.

And the same was true under section 1753, Code 1871, whether the title was acquired by purchase at a tax collector's sale, or from the levee treasurer after the land has been struck off to him. Beirne v. Burdette, 52 Miss. 795.

Act Miss. March 1, 1875, known as the Abatement Act, allowing delinquent owners of land sold for taxes to pay one year's taxes for 1874 as the price of relinquishment of all the State's claim on the land for past, failing in which the land was to be sold as prescribed, did not, by its mere approval, divest the title of the State or levee board; but if the owner did not pay the taxes for 1874, and the land was not sold under the act, it remained unaffected by the act, and continued to be held as before. Paxton v. Valley Land Co., 68 Miss. 739, 10 So. 77.

While lands belonged to the board of liquidating levee commissioners, under a valid tax sale for levee taxes, they were not subject to be again sold for levee taxes, and if so resold, no title is thereby conveyed. Mitchell v. Bond, 84 Miss. 72, 36 So. 148.

Where land was sold in 1867 to the State for taxes and again in 1870 to the liquidating levee board, and afterward under the decree of the Chancery Court of Hinds county, in Gibbs v. Green, purchased by one who procured a release of the State's title under the acts of March 4, 1884 (Laws, p. 182), and March 2, 1888 (Laws, p. 41), the validity of title so acquired is not affected by the question whether the title was in the levee board or State, since if either had title, he acquired it; and such land is thereafter subject to sale for unpaid taxes as his property. Means v. Haley, 84 Miss. 550, 36 So. 257.

Tax sales to the liquidating levee board for delinquent liquidating taxes are not void because not made on the proper day; nor because the tax collectors had not executed their official bonds before making the sales; nor because deeds were not executed by the tax collectors, there being written evidence of the sale. Woodruff v. State, 77 Miss. 68, 25 So. 483.

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that he (Outlaw) and John and William Rose had purchased the same on May 10, 1875, at a tax sale of said levee board.

That on February 10, 1879, the said Outlaw had purchased these same lands from the levee commissioners and received a deed therefor, of which deed complainant had learned after his own title to this land had been confirmed and deed accordingly. That in February, 1880, complainant had endeavored to redeem these lands from the said Outlaw and others, but that they claimed a paramount title to said lands.

That, at the date of the several purchases for taxes, Field's children were minors, and were minors when the sale was made to Outlaw and others, wherefore defendants acquired no title as against such minors or complainant. Complainant offered to refund to defendants all taxes paid by them on the lands, and prayed that Outlaw and others be made parties defendant, and that guardians *ad litem* be appointed for certain minor children interested, and that the deed from Gwin and Hemingway as commissioners be declared void and canceled as a cloud upon complainant's title, and that his own title be established.

The answer admitted the judgment against Fields and the qualification of J. H. Fields as administrator, and the sale by him of the lands, as alleged. That the lands were sold to the levee board in May, 1870, for the taxes of 1867, 1868, and 1869, but denied that complainant had no notice of the condition of said lands at the time of his purchase thereof. Admitted the purchase by defendants of said lands on May 10, 1875, from the tax collector, and alleged recordation of such conveyance. Admitted the purchase of February 10, 1879, from S. Gwin, Auditor of Public Accounts, and W. L. Hemingway, Treasurer, respectively, of the State of Mississippi, and commissioners under a decree from the Chancery Court of Hinds county, Mississippi, duly recorded in the county of the location of the lands. Denied that complainant ever made any arrangements for the redemption of the lands. Admitted that they claimed paramount title to the land.

APPEALED from Chancery Court, LeFlore county, R. W. WILLIAMSON, Chancellor.

Reversed and remanded, February 9, 1885.

Attorneys for appellant, H. S. Hooker and Calhoon & Green.

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Attorneys for appellee, L. P. Yerger and W. B. Helm.

Brief of H. S. Hooker:

This was a bill filed to set aside certain deeds held by appellants as a cloud on appellee's title. The decree attempts to declare the conveyances under which appellants claim title as illegal and void, and to establish appellee's title.

If we examine the pleadings and evidence in the cause, we can find nothing upon which the chancellor could predicate his decree.

The statute makes the deeds of appellants *prima facie* evidence of a compliance with all the requirements of the statute, and of a good title. All *vitiating matter* must be *averred* and *proven.* The tax and levee deeds are *prima facie evidence* of a *good* and *valid* title in appellants and *must stand* unless the appellee has in his pleading *averred* and by his evidence *established* the existence or nonexistence of those things which vitiate the deeds. Griffin *v.* Dogan, 48 Miss. 11; Meeks *v.* Whately, 48 Miss. 337.

He cannot, under the statute or the ordinary rules of chancery pleading, prove any vitiating matter that has not been alleged in his bill.

Upon an examination of the bill, the only vitiating matter charged is that the sales "were irregular and void," without stating in what the irregularity consisted. The only claim upon which the levee deed could be declared void is the sale for the taxes for 1867, 1868, and 1869. The taxes were all properly assessed, charged, and levied upon the lands. There is no complaint of a wrongful assessment or a wrongful levy, but the inference from the bill is that the sale for the three years' taxes which were then due was void.

That the sheriff may sell land for back taxes, see Blackwell on Tax Titles, p. 163.

But appellants had also a tax title derived from a sale of the land for taxes on the 10th of May, 1875. (The sale was under the Abatement Act.) There is *not* a *single fact* averred in the bill which even tends to defeat and avoid appellants' deed. The simple and only averment of the bill is that the tax deed is irregular and void. It does not pretend to show wherein it is irregular or the existence or nonexistence of what facts render it void. We submit that there is nothing in the bill upon which the court could predicate a decree that this deed was void and a cloud on complainant's title.

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The complainant's evidence, which was admitted over defendant's objection, does not sustain the decree. It was incompetent to prove the existence or nonexistence of facts which were not averred in the complainant's bill. But, even conceding the competency of the evidence, it only goes to the validity of the title acquired by appellants under their purchase on the 10th of February, 1879. It does not affect their title to the land acquired by their purchase on the 10th of May, 1875. As to the last-named but first-made purchase, there is not an iota of testimony that goes to vitiate it. Hence we insist that there is nothing in the record upon which the Chancery Court could base the decree it made.

The attitude of complainant seems to be this: He sets up that we have a deed to his land, which deed upon its face imports that we have a good title. This deed he asks the court to declare illegal and a cloud on his title, without pretending to aver or prove any facts which render the deed illegal. In other words, he wants the court to reverse the statute and all the prior decisions and hold that a tax deed, instead of being *prima facie* evidence of a title, is *prima facie* evidence of a want of title. That, instead of the presumptions existing that the law has been complied with, the presumption exists that the law has not been complied with. * * *

Brief of Calhoon & Green:

* * * The deed to levee commissioners in 1870 was in accordance with the statute, except that, instead of a $40,000 bond being given, the bond was in penalty of $25,000.

But for the announcement, as said in Dingey *v.* Paxton, 60 Miss.; in Vasser *v.* George, 47 Miss., that the failure to give the statutory bond avoided the sale, it would never have been supposed to have that effect. In Vasser *v.* George, the principles announced should have decided the case the other way. The provision of the Constitution of 1869, in regard to construction to be given tax titles, was not adverted to in that case and the spirit of that provision was therein denied.

Practically Dingey *v.* Paxton overrules Vasser *v.* George.

But the levee tax title sought to be canceled does not rest alone on the force of its own provisions for validity. It has passed through the Chancery Court and there, after full opportunity given to redeem, the lands were directed to be resold, and under this decree appellants bought. If the owners of the land were parties

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to that suit, and it does not appear by the decree who were parties, certain it is that the decree of sale must carry the title. There can be no doubt that the taxes were a lien and, even if the sale was invalid by reason of no bond, it was proper for the Chancery Court in the Green *v.* Gibbs decree to order a sale of the lands to pay the taxes or, in other words, to enforce the lien.

Where a sale is made under the decree of the Chancery Court, it must be presumed that the court had jurisdiction of all the parties in interest. The record here does not contradict this presumption. *Non constat,* but that the owner of the land appeared in the Chancery Court and contested the title to these very lands. So far from showing that appellant had no title, the decrees offered in evidence confirm their title. Certain it is that the tax deeds and decree do not show a "*cloud,*" but a good title.

Appellants bought from *tax collector* under Abatement Act, which was recorded June, 1876; sale was made and deed dated May 10, 1875. This is a perfect title. Cochran *v.* Baker, 60 Miss. 282.

If there was any defect in it, the statute bars recovery. Acts 1875, § 13, p. 16.

This deed was offered in evidence, though there is no proper allegation in the bill assailing it.

Brief of Yerger & Helm:

* * * The deeds and sales of Johnson are void, because not made on the second Monday of May, as required by law, but were made on the 10th day of May, 1870, which the court judicially knows was *not* the second Monday of May in that year. The court will not indulge in the presumption that Johnson did commence the sale on the 9th of May, for there was nothing in the record to indicate it. And if such was the case, the person holding under him ought to have offered proof on that point, because the record shows that the sale was not made on the day appointed by law.

In Mayer *v.* Peebles, 58 Miss. 628, it was contended that the court ought to presume that the sale was continued from day to day till the day of sale, but the court held that the law required the sale to be on the second Monday of May, which, in 1869, was the tenth day; therefore the sale was declared void.

The sale of Johnson was void on another ground. He sold the

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land in 1870, at one time, for the taxes claimed to be due for the three years, 1867, 1868, and 1869; when the statute required that the "tax * * * shall be payable *annually,* on or before the 1st day of May, 1868 (see section 1 of Acts of 1867), and the land shall be subject to sale without further assessment, unless the tax thereon be paid on or before the first day of May of each and every year (§ 2, Id.), and the tax levied and assessed as aforesaid shall be collected in the same manner, and the land which may be sold for the payment thereof, *shall be sold on the second Monday of May in each and every year,* in the same manner — as is provided for the collection or sale of land for taxes in the Act of December 2, 1858, aforesaid, and the amendments thereto." See § 3, Id.

The second section of the Act of 1858 required the sheriff to collect the tax within the time prescribed therein, that is to say, on the 1st of April, 1859, and annually thereafter; and the sixth section provides that, should any owner or owners of any lands, or any person interested in the same, fail to pay the taxes, at the time when the same may become due, it shall be the duty of the sheriff in the county in which the land may be situated, without further notice, on the second Monday of April, in each and every year after the tax may become due, to sell the land in default, or so much thereof as may be sufficient to pay the tax required, and all cost of conveyance to the purchaser, to the highest bidder for cash. In other words, he was bound to sell *annually* for the tax of each year, and could not sell at one time for the taxes of two or three years.

The sale of Quinn on May 10, 1875, was void, because the land was not held or claimed by the State for taxes for any year previous to 1874. Witty *v.* Gamble, 55 Miss. ; Mayson *v.* Banks, 50 Miss. 447; Dingy *v.* Paxton, 60 Miss. 1038; Weathersby *v.* Thoma, 57 Miss. 296; French *v.* Ladd, 57 Miss. 678.

The land was not sold for the taxes of 1874 *alone,* as was required by law, but was sold for the taxes of 1874 and 50 per cent. damages added. Section 5 of the Act of March 1, 1875, declares that all land heretofore held or claimed for taxes, either by the State or any of the said three levee boards, are hereby declared to be liable for the taxes of 1874 *alone,* to wit: the State tax, the teachers' fund tax, and county taxes for said fiscal year of 1874, and likewise for the taxes of the three levee boards for the said

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fiscal year of 1874, as changed by section 4 of this act, commencing with January 1, 1874, and ending with the 31st day of December, 1874.

If the premises be correct, it follows that the deed of Gwin & Hemingway conveyed no title.

OPINION.— CAMPBELL, C. J., delivered the opinion of the court:

There is nothing in the record to impeach the title conveyed by the deed of the tax collector in pursuance of the sale made on the 10th of May, 1875.

The deed of Johnson, tax collector, made May 10, 1870, if admitted to be void, shows the fact that the land was conveyed to the levee board. The inference is a fair one, from this deed and the subsequent sale of the land by Gwin & Hemingway, that this land was claimed by the levee board. Being claimed by this board for delinquent taxes for years prior to 1874, it was subject to the operation of the "Abatement Act," and, having been sold under it and in accordance with it, so far as appears, the purchasers at the sale acquired title. The chancellor erred in vacating the deed of May 10, 1875.

Reversed and remanded.

HARRISON WALKER v. THE STATE.

Criminal Law — Rape — Sufficiency of Evidence to Sustain Verdict.

Manifest error in a verdict is sufficient ground for the reversal of the judgment thereon.[1]

1

A new trial will be granted where there is no evidence to sustain the verdict. Crocket *v.* Young, 1 S. & M. 241.

And so, where the verdict, considered with reference to the issue submitted to the jury, is not sustained by the evidence. Otey *v.* McAfee, 38 Miss. 348.

A verdict will not be disturbed unless it is manifest from the whole record that it is clearly wrong, or unless misdirection or other apparent error may have produced it. McAlexander *v.* Puryear, 48 Miss. 420; Pfeifer *v.* Chamberlain, 52 Miss. 89.

While maintaining inviolate the right of trial by jury, and adhering to the rule that a verdict will not be disturbed merely because the court differs from

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Statement of the Case.

Appellant, Walker, was tried and convicted in the Circuit Court of Lawrence county of rape and sentenced to the penitentiary and appeals. On the trial the prosecutrix, Emily Weathersby, testified that defendant came to the house of her mother Julia Berry, where she lived, one night and after he got there she (witness), lay down across a bed in the room and defendant lay down by her and laid his head on her and said, boys, look what a soft pillow I

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the jury in considering the evidence, yet, if after a careful consideration of the evidence for plaintiff, giving it all full credit, the court cannot discover any probable connection between the defendant's negligence and the injury suffered a verdict for the plaintiff will be set aside. Railroad Co. *v.* Cathey, 70 Miss. 332, 12 So. 253.

While the trial judge should use due caution not to set his opinion against that of the jury, he should not hesitate to set aside any verdict not supported by evidence. Dobson *v.* State, 67 Miss. 330, 7 So. 327.

Reluctant as this court is to disturb a verdict upon the sole ground of the sufficiency of the evidence, where there is a palpable failure of proof to sustain the verdict, it will not be allowed to stand. Harris *v.* State, 71 Miss. 462, 14 So. 266; Monroe *v.* State, 71 Miss. 196, 13 So. 884.

The verdict of the jury will not be reversed, on account of being contrary to the evidence, unless it most convincingly and indubitably appears to be so. King *v.* Rowan, 34 So. 325.

The question in such a case is not is the verdict clearly right but is it manifestly wrong? Waul *v.* Kirkman, 13 S. & M. 599; Prewett *v.* Coopwood, 30 Miss. 369; Drake *v.* Surget, 36 Miss. 458.

Where the jury find against the great preponderance of evidence, a new trial will be granted, even by the high court, when it was refused by the court below, but there must be a clear preponderance of the evidence against the verdict. Brown *v.* Forbes, 8 S. & M. 498; Sims *v.* McIntyre, 8 S. & M. 324.

To authorize the high court, however, to interfere on such a ground, the error in refusing a new trial must be clear; for every presumption is to be indulged in favor of the verdict. Peck *v.* Thompson, 1 Cush. 367.

A new trial was granted in this case because the verdict was against the preponderance of the evidence. McQueen *v.* Bostwick, 12 S. & M. 604.

Where there is a conflict in the evidence, one part sustaining the verdict, and the other against it, a new trial will not be granted unless the verdict be very clearly wrong. Garland *v.* Stewart, 31 Miss. 314; Gay *v.* Lemle, 32 Miss. 309.

The preponderance must be very clearly against the verdict. Harris *v.* Halliday, 4 How. 338.

Where the mind cannot repose with entire confidence and certainty upon a conclusion in favor of either party, the verdict will not be disturbed. Watson *v.* Dickens, 12 S. & M. 608.

A new trial will not be granted where the verdict is in accordance with the evidence, and there is no error of law complained of in the charges. Jenkins *v.* Whitehead, 1 S. & M. 157.

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have; that defendant then asked her "for it" and she replied that she would not give "it to him;" that her mother and others were present; that she then went out to get some wood for the fire and defendant went with her, following very close behind; that when she had gone about thirty yards from the house defendant again asked her "for it" and she again refused; that defendant then threw her down, forced her legs apart, and made a partial entrance of her person; that she gave no alarm except to say "if you don't quit I'll tell mama" and he then quit; that all this occurred before bedtime and her mother and others were in the house and were awake; that she knew where the wood was before she went for it; that when she told defendant that if he did not quit she would tell her mother, her mother came to the door and said something; that defendant went back to the house ahead of her and went to bed; that she came back crying and told her mother that Harrison had raped her and her mother accosted defendant and defendant said, yes, he had done it and would do it again and left the house soon afterward.

Julia Berry testified that defendant came to her house one night and as her baby was sick she asked him to stay all night; that before bedtime she sent Emily out after some wood and defendant went with her and after they went out she heard Emily say "if you don't quit I'll tell mother," and she saw Emily and defendant getting over the fence and coming toward the house; that defendant came in a few feet ahead and went to bed immediately; that Emily was crying and told her that Harrison had raped her; that witness went to defendant and told him to get up and own up about what he had been doing and he said he had done it and would do it again.

Defendant testified that he went to the house where Emily Weathersby lived by previous arrangements with her for the purpose of having sexual intercourse with her and that after they got outside of the house they had sexual intercourse and no objection was made by Emily, but she was a willing party.

Mary Berry testified for defendant that she was a daughter of Julia Berry and a step-sister of Emily Weathersby; that she was at the house on the night of the alleged rape and defendant came to the house and Emily and defendant were lying on the bed together; that Emily went out after some wood and defendant went with her and they came back, Emily bringing some wood with her,

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and made a fire; that she was not crying and said nothing about being raped and made no complaint against defendant; that defendant went to bed in the same room and went to sleep; that she (witness), went to bed and heard nothing of any rape until nearly daylight the next morning when Julia Berry told her that defendant had raped Emily and asked her to go to a neighbor's house with her and have Emily examined.

Defendant's motion for a new trial was overruled and he appeals.

APPEALED from Circuit Court, Lawrence County A. G. MAYERS, Judge.

Reversed and remanded, March 8, 1886.

Attorneys for appellant, A. H. Longino and A. E. Weathersby.

Attorney for appellee, T. M. Miller, Attorney-General.

Attorneys in this case submitted briefs on the facts.

OPINION.— CAMPBELL, J., delivered the opinion of the court.

Reluctant as we are to set aside the finding of a jury which the presiding judge has refused to disturb, we have, after most careful consideration, felt constrained by the facts of this case, to declare our conviction that the verdict is manifestly wrong, and to reverse the judgment, award a new trial, and remand the case.

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H. MOODY et al. v. CHAS. GALIGHER & SON.

Attachment — Knowledge of Existing Incumbrance.

An attachment suit charging a conveyance by deed of trust for the purpose of defrauding creditors will be dismissed where a creditor enters into a contract of sale of merchandise with full knowledge of the existence of the incumbrance at the time.[1]

Instructions.

It is error to refuse instructions that embody uncontradicted facts proven at the trial.[2]

This was an attachment suit instituted in the Circuit Court of Copiah county, charging fraud in the procurement of goods, wares, and merchandise by the appellant of the appellee and that appellant had disposed of, or was about to dispose of, his property or rights in action for the purpose of defrauding his creditors. All of which was denied by defendant. The evidence showed that defendant was operating a general merchandise store in Hazle-

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Actual notice of a deed is as effective as notice by record. Myers *v.* Buchanan, 46 Miss. 397; Buck *v.* Payne, 50 Miss. 648.

If a purchaser of personal property embraced in an unrecorded mortgage, knows facts which, if followed up, will discover the existence of the mortgage, he is under duty to make the investigation, and failing in this, he is charged with such knowledge as the inquiry would have disclosed. But he is not bound to attend to vague rumors circulated by strangers or persons having no interest in the property. Buck *v.* Payne, 50 Miss. 648.

2

Where there is evidence to establish a material fact, it is error to refuse instructions as to its effect, although the weight of evidence may tend to disprove it. Levy *v.* Gray, 56 Miss. 318; Nichols *v.* State, 46 Miss. 284; Hursey *v.* Hassam, 45 Miss. 133.

In a suit on an insurance policy where a forfeiture is claimed, and on appeal the bill of exceptions recites that there was evidence "tending to show" certain facts sufficient to avoid a forfeiture of the policy, the refusal of proper instructions based on such facts will be held erroneous. Rivara *v.* Insurance Co., 62 Miss. 720.

Though the court may not charge upon the weight of evidence, it is not error to assume as true a fact which is fully established and as to which there is no controversy. Carberry *v.* Burns, 68 Miss. 573, 9 So. 290; Railway Co. *v.* Phillips, 70 Miss. 14, 11 So. 602.

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hurst and that he was indebted to some New Orleans merchants at the time he contracted the debt sued on by plaintiffs, and also that there was a "running deed of trust" upon his stock of goods in favor of John P. Richardson, one of his creditors, which fact he made known to plaintiff's agent when the debt sued on was contracted, and that the agent told him "it was all right, that would make no difference." No evidence was offered by plaintiffs. The following instructions were asked by defendant and refused:

"The court instructs the jury that if they believe from the evidence that plaintiffs, prior to any dealings with the defendant, had knowledge of and consented to defendant's merchandising with a deed of trust upon his stock by a third party, then the deed was no ground to sustain their issue and they will be warranted in finding the attachment wrongfully sued out."

From a judgment sustaining the attachment, defendant appeals.

APPEALED from Circuit Court, Copiah county, T. J. WHARTON, Judge.

Reversed and remanded, March 22, 1886.

Attorneys for appellant, Calhoon & Green.

Attorney for appellee, H. C. Conn.

Brief of Calhooon & Green:

* * * The refusal of the instruction asked by Moody, to the effect that the trust deed was no ground of attachment of itself if plaintiff had knowledge of it before the dealings, was palpably erroneous. Moody *v.* Galigher, MSS. Opinion.

Because of this the case was reversed before. Moody himself was the only witness, and he testified distinctly to telling plaintiff's agent before the dealings that his "backers in New Orleans held a running deed of trust on his stock," and the agent said it made no difference and sold him the goods.

The case is precisely as it was formerly.

Brief of H. C. Conn:

* * * The court did not err in refusing the first instruction for defendant. That instruction would have instructed the jury

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that these deeds of trust could not be considered at all in their consideration upon the question before them. While it may be admitted that all these deeds of trust, including the Cottam deed, were not sufficient to sustain the attachment, yet it would have been error in the court to give an instruction ruling them entirely out of the case.

When this case was before this court originally there was nothing but the deed of trust to Richardson, if there was one, and Moody's testimony that the deed of trust offered by plaintiff was a renewal of that supposed deed. In this trial defendant undertook to show what deeds existed at the beginning of his dealings with plaintiff, and it appears to be a deed to Cottam & Co., and not to Richardson at all.

The jury had a right to consider all these facts unembarrassed by instruction such as was asked.

See opinion in case of Moody *v.* Galigher referred to in appellant's brief.

OPINION.—COOPER, C. J., delivered the opinion of the court:

The court should have given the first instruction asked for by the defendant. It correctly announced the law as declared by this court in this case on a former appeal.

Reversed and remanded.

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MISSISSIPPI & TENNESSEE RAILROAD CO. *v.* M. E. GRAYSON.

Common Carriers — Railroads — Suits for Personal Injuries — Platforms — Failure to Stop Trains at Usual Place — Injury to Passengers.

Plaintiff showed that defendant's train ran past the proper stopping place, and that when she attempted to board the train, she was thrown off and injured by reason of the alleged improper starting of the train. In such case it is error to instruct the jury that defendant is liable for failure to provide a platform at a crossing from which passengers should board the train.[1]

Same.

It is not the duty of the conductor to assist passengers in boarding defendant's train.

Same.

In such case the question was, whether plaintiff had a reasonable opportunity of boarding the train.

Mrs. M. E. Grayson sued the Mississippi & Tennessee Railroad Company for injuries alleged to have been inflicted upon her by the improper starting and handling of the defendant's train.

From a judgment in plaintiff's favor, defendant appealed to the Supreme Court.

On the 2d of July, 1882, the appellee being on a visit at the house of her brother-in-law, three and one-half miles from Tallahatchie Crossing, a flag station on appellant's road, and desiring to go to her home at Pope Station, on said road, walked to the crossing in company with John Powers and T. J. Hendrix, and her daughter, three years old, to take passage on the night train. The

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One who by signals causes a passenger train to stop at night at a point not a stopping place, and while endeavoring to enter, though with reasonable caution, is injured by the sudden starting of the train, cannot recover for the injury if his purpose to take passage was unknown to the conductor and other trainmen. Under such circumstances, when injured, he had not acquired the rights of a passenger. Railroad Co. *v.* Robbins, 68 Miss. 643, 10 So. 60; Railroad Co. *v.* McAfee, 71 Miss. 70, 14 So. 260; Railroad Co. *v.* Harris, 71 Miss. 74, 14 So. 263; Railroad Co. *v.* Latham, 72 Miss. 32, 16 So. 757.

The fact that he succeeded in entering the car, and that the conductor, finding him there, collected fare from him as from other passengers, could not give color to past occurrences which had resulted in his injury. Railroad Co. *v.* Robinson, 68 Miss. 643, 10 So. 60.

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night being dark a fire was built near the road, and when the train was heard coming and when 900 feet from the crossing, Hendrix waved a firebrand, the engine whistled to stop, but ran by the crossing, M. E. Grayson says fifty steps, Powers thirty steps, Hendrix forty feet, the engineer fifty or sixty feet. When the engine whistled the firebrand was thrown down. Mrs. Grayson, Powers, and Hendrix agree in their statement that they walked along the railroad toward the train, Powers carrying the child, Hendrix a bundle, passed the sleeping car on the east side, and came to the rear of the next coach. Mrs. Grayson stated that she put her right hand on the railing of the platform of that car, and one foot on the first step when the train moved, and pulled off from her, throwing her back, and left her on the side of the road. That Powers was standing close to her with the child in his arms when the train moved off, and Hendrix some steps from her. That she walked back to M. P. Grayson's with Powers and Hendrix that night.

The following instructions for the plaintiff in the court below are assigned as error by appellant Railroad Company:

(1.) A Railway Company is bound to provide proper means for the convenience of passengers in getting off and on their trains; and they are bound to stop their trains sufficiently long for passengers to board their trains; and if the train pass the usual place for boarding trains, it is their duty to back to said place; and the failure of the company to stop at the proper place may be considered; and when there is no platform it is the duty of the conductor to afford necessary assistance to a passenger to get on the train; and if, without such assistance, and without a reasonable excuse for failing to afford such assistance, the defendant, in attempting to board the train without any fault of her own is injured, the company is liable.

(3.) The court instructs the jury that the law requires the railroad company to provide means of getting on and off their trains at every station, and if they believe from the evidence that no such provision was made at Tallahatchie Crossing, and that the absence of said means contributed to the injury to the plaintiff in this cause, they may take this into consideration in making up their verdict.

(7.) The court instructs the jury that railroad companies are held to the strictest responsibility for care, vigilance, and skill on the part of themselves and all persons employed by them. That

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it is their duty to provide convenient means for persons to get on and off their trains; to stop their trains at all stations when required sufficiently long to allow persons to get off and on the train with safety; and if the jury believe from the evidence that the defendant stopped its train at an unusual place at the station, and not a reasonable time to allow the plaintiff to get on, but moved the same off at such a rate of speed that plaintiff was injured in her attempt to board the train, then the jury shall find for the plaintiff such damages as she has sustained; and if the jury further believe that such injury was caused by wantonness, rudeness, or caprice, then the jury should award plaintiff exemplary damages by way of punishment to the defendant.

(8.) A railway company is bound to provide proper means for the convenience of passengers in getting off and on their trains; and they are bound to stop their trains sufficiently long for passengers to board their trains; and if the train pass the usual place of boarding trains, it is their duty to back to said place, and the failure of the company to stop at the proper place may be considered in determining whether or not there was negligence; and when there is no platform, it is the duty of the conductor to afford necessary assistance to a passenger to get on the train, and if, without such assistance, and without reasonable excuse for failure to afford such assistance, the defendant in attempting to board the train without any fault of her own is injured, the company is liable.

APPEALED from Circuit Court, Panola county, Second District, A. T. ROANE, Judge.

Reversed and remanded, February 2, 1885.

Attorneys for appellant, T. W. White and J. B. Boothe.

Attorney for appellee, S. C. Cook.

Brief of White & Boothe:

* * * On a fair analysis of the testimony, it is evident that the verdict of the jury was manifestly wrong and ought to be set aside. The verdict was against the weight and preponderance of evidence, and the damages awarded were excessive.

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The court erred in giving the first instruction asked for the plaintiff. This instruction assumes that the plaintiff was without fault, and that defendant's conductor failed to afford assistance without a reasonable excuse. * * *

The third instruction given for plaintiff is erroneous, because its indefinite language was calculated to mislead the jury. * * *

The seventh instruction given for plaintiff is manifestly and grossly erroneous. It instructed the jury that if they, from the evidence, reached a certain hypothesis they "*should* award plaintiff exemplary damages by way of punishment to the defendant."

The awarding of exemplary damages is always discretionary with the jury, and an instruction which informs them that under any state of facts it is their *duty* to award them is improper. New Orleans R. Co. *v.* Burke, 50 Miss. 201.

This was not a case for the allowance of such damages under any event. There was no oppression, insult, willful wrong, or any other element of conduct on the part of defendant's employees authorizing the infliction of exemplary damages. Southern R. *v.* Kendrick, 40 Miss. 374; New Orleans R. *v.* Statham, 42 Miss 607; Memphis R. *v.* Whitfield, 44 Miss. 466; M. & C. R. *v.* Green, 52 Miss. 779; Chicago, etc., R. *v.* Scurr, 59 Miss. 456.

The eighth, ninth, and tenth instructions for plaintiff are erroneous for the reasons already shown, and for the further reason they assume a state of facts not sustained by the proof. * * *

In addition to the objections already urged, the first, third, seventh, and eighth instructions given for the plaintiff are erroneous and well calculated to mislead the jury in this, they inform the jury that it is the duty of railroad companies "to provide proper means for the convenience of passengers in getting off and on their trains," from which instructions the jury doubtless inferred that proper means had not been provided in this case; when, as a matter of fact, suitable steps affording access to every coach were all that the law requires. The jury doubtless believed from the continued emphasis of this feature, by embodying it in four different instructions, that something else was necessary besides convenient steps, and that it was the duty of the company to have a platform erected at the crossing, and perhaps other conveniences. The proof shows that there was no depot at the crossing, but the dirt road crossed the railroad at this point, and the defendant's train merely stopped there for the public as a matter of favor to them

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and not as a matter of right, and it follows of course that persons desiring to get on and off there, and knowing the condition of things, must take all the consequences resulting from any inconvenience they are subjected to at such way-station.

Brief of S. C. Cook:

If we correctly interpret the decisions of this court, the law as announced in many cases wherein railroad companies have been sued for injuries to passengers is summarized and condensed in the following language: Where the proof shows anything that will warrant an imputation of willfulness, recklessness, or rudeness, it is the duty of the court to instruct the jury that they may inflict upon the railroad exemplary or punitive damages. Chicago R. Co. *v.* Scurr, 59 Miss. 463.

So that the only question to be determined by this court is, does the proof warrant such an imputation, or, is there any evidence which would justify the court in instructing the jury upon such damages? If there is a conflict of evidence, the plaintiff was clearly entitled to such instruction. This was settled in the Scurr case. The proof develops that "Tallahatchie Crossing" was a flag station, to which the company sold tickets; that it was a place where the defendant's trains stopped whenever signaled, to take on passengers; that there was no provision made by the company for getting off and on their trains, and this, too, when the station was in the river bottom several miles from the habitation of man. Upon this point I direct the attention of the court to the following authorities: M. & C. R. Co. *v.* Whitney, 44 Miss. 391; Cooley on Torts, 605, 606, and 642; Addison on Torts, § 245.

I call your especial attention to the testimony of Conductor Bellenger, for it is "the milk in the cocoanut." Bellenger says, when cross-examined: "When the engineer signaled for the crossing I was in the baggage car and immediately started to the rear of the train. I passed through one coach and to the middle of the next and pulled the bell rope, giving the engineer the signal to go ahead. I did not look out, or attempt to look out to ascertain who was waiting to board the train."

Will this court hold that it was not culpable negligence on Bellenger's part to give the engineer the signal to pull out, without ever attempting to ascertain who had signaled at a regular

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flag station, and this, too, when the night was dark and stormy and the station located in a river bottom? * * *

The only charge seriously objected to is the charge wherein the court made the finding of exemplary damages mandatory when the jury were satisfied of the existence of certain facts. In answer to this objection we invite this court to an examination of all the charges given both for the defendant and the plaintiff below. If the law was correctly expounded in all the charges, the judgment will not be reversed because one instruction taken by itself is too broad. Mask's Case, 36 Miss. 77; Evans' Case, 44 Miss. 762.

This is the rule of law often announced by this court in cases involving life or death and we know no exception in favor of railroads. One erroneous charge may be cured by another charge which expounds the correct principle. Dickson *v.* Moody, 2 S. & M. 17.

It is evident that the jury was not misled by this charge, and they knew this was left entirely to their discretion. * * *

OPINION.—CAMPBELL, C. J., delivered the opinion of the court:

The first, third, seventh, and eighth instructions for the plaintiff should not have been given. The existence or nonexistence of a platform at the crossing where the train was usually stopped had nothing to do with the dispute in this case, which is whether the plaintiff was afforded a reasonable opportunity to "board" the train.

Her complaint is that the train ran past the proper place, stopped, thereby inviting her to get on it, and when she attempted it the train was improperly started, whereby she was thrown off and injured. What good would a platform at the crossing have done?

We condemn the instructions as inapplicable and misleading in this respect, but do not wish to be understood as sanctioning the announcement contained in some of them that a platform at this crossing was necessary, or that it is a conductor's duty to assist passengers on the train.

For these errors, forbearing to express an opinion on other questionable features of the case, we reverse the judgment and remand the cause for a new trial.

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Statement of the Case.

E. F. NOEL *v.* H. L. HOOKER.

Instructions.

It is error to refuse to give instructions conditioned upon the facts adduced from the evidence.[1]

Deed of Trust — Amount Expressed — Purchase Price.

A deed of trust is security only for the amount expressed in same, and where such amount is not in full satisfaction of the purchase price of that which it covers, there can be no cause of action which seeks to subject the property to its terms for the unpaid balance.[2]

A replevin suit was instituted in the justice court of Holmes county for the recovery of a mule in the possession of appellant. The mule in controversy was covered by a deed of trust to appellee for $40 for supplies advanced, and for such other supplies as might be advanced during the year 1884, to one Burwell Willis, to whom the mule was sold prior to the execution of the deed of trust. A second deed of trust was given appellant on the mule. Evidence was offered showing that the amount of the trust deed to appellee was paid. The price of the mule was not embraced in this trust

1

It will not make an instruction bad, which is otherwise unobjectionable, that a fact is assumed in it to exist, which is fully established by the proof, and about which there is no contradiction in the evidence. Lamar *v.* Williams, 39 Miss. 342; Heirn *v.* McCaughan, 32 Miss. 17.

Nor will it be error to assume the existence of a fact, which is conceded on the trial by both parties. Cook *v.* Whitfield, 41 Miss. 841.

An instruction beginning, "Although it may appear, from the evidence, that defendant has been unable to account for the $1,000 sued for in this action," was erroneous, where the question whether the defendant had ever received the money was a fact in issue, as assuming that the $1,000 had been receievd, and is not cured by an accurate legal statement in the last clause thereof. Coleman *v.* Adair, 75 Miss. 660, 23 So. 369.

An instruction which assumes certain facts to be proved is not erroneous where such facts were testified to by witnesses for both parties and are not contradicted. Alabama & V. Ry. Co. *v.* Phillips, 70 Miss. 14, 11 So. 602.

2

A deed of trust given to secure purchase money on the land bought and "the crop * * * to be raised by us" during the succeeding year embraces the crop on no other land than that conveyed. Pettis *v.* Sullivan, 21 So. 607.

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deed, which was executed after the sale of the mule by appellee. Instructions asked for and refused for defendant were as follows:

"The court instructs the jury that whatever Burwell Willis might have owed Carrie Webster previous to April 11, 1884, only $40 of such amount is secured by the deed of trust through which complainant claims, and if such $40 and all subsequent advances and merchandise under said deed of trust have been paid, then they will find for defendant."

From a judgment for plaintiff defendant appeals.

APPEALED from Circuit Court, Holmes county, C. H. CAMPBELL, Judge.

Reversed and remanded, April 26, 1886.

Attorneys for appellant, Gwin & Noel.

Attorneys for appellee, Hooker & Wilson.

Brief of Gwin & Noel:

* * * The chief error complained of, and the one which we confidently expect a reversal, is that, neither according to the terms of the deed of trust nor any other agreement of the parties, was the price of the mule made a part of the indebtedness secured by the deed of trust, and that the indebtedness of $40 for supplies already advanced, and the supplies thereafter advanced, were admittedly more than paid for. * * *

The court refused to instruct the jury that the payment of the $40 on supplies advanced, up to the time of giving the deed of trust, and the payment of all supplies and merchandise thereafter advanced, would satisfy the deed of trust and entitle appellant to a verdict; and instructed the jury, on behalf of appellee in one instruction, that the execution of the deed of trust by Willis imposed upon all persons having dealings with him the duty to go to the beneficiary and ascertain the amount of indebtedness it secured prior, as well as subsequent, to the execution of the deed of trust, and, in another, that, if they believed the mule was sold to Willis at $160 at any time prior to the institution of this suit, and that the same was not paid for, appellee was entitled to recover.

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* * * In Jones on Mortgages it is said that "The amount of an ascertained debt should be stated." The antecedent portion of the debt secured in this case was or could have been ascertained. The same work declares in section 34: "But when it is attempted to describe the debts secured, to entitle a debt to the benefit of the security, it must come fairly within the terms used in the mortgage." * * *

Brief of Hooker & Wilson:

* * * As to the only point discussed by counsel. The pecuniary condition of Willis, his tenancy, his dependency on his landlord for everything, that he owed for the mule, as well as for supplies, were all known to Noel long before he bought the mule. To say that he was a purchaser for value without notice, every legitimate inference from the acts and conduct of the parties must be set aside. The relations and dealings of the parties were such, and so well known to the defendant, that he was put on inquiry. All that is necessary in any mortgage is enough to put parties on inquiry. Although a deed of trust may not have any amount mentioned, or the wrong amount, still it will be good for the amount properly due against subsequent purchasers, because it puts them on inquiry. This matter is discussed by Mr. Jones in his work on Mortgages, who says, in section 344, that it is *generally* held to be sufficient if it appear that a debt is secured and the amount of it may be ascertained by reference to other instruments or by inquiry otherwise. There can be no question as to the amount Burwell owed, for he admits it all except about $5 or $6. The mule was as much supplies as anything else, and its price protected by the deed of trust. It makes no difference under the authorities if the amount is erroneously stated; it served to put the parties on inquiry, and they are charged with notice of everything to which that inquiry would have conducted them. We refer the court to Jones on Mortgages, § 343 *et seq.* for a discussion of the description of the debt.

The instructions granted fairly present this idea, that the mentioning of the amount does not conclude the parties. It is absolutely binding upon neither, but the true amount due and secured can always be shown, and that parties dealing with the property, as attempted by defendant, must make their inquiries at the proper source. The instructions asked for by the defendants attempted

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to hold the deed of trust as security only for the exact amount specified. * * *

OPINION.— ARNOLD, J., delivered the opinion of the court:

The price of the mule in controversy was not embraced in the deed of trust from Burwell Willis to Carrie Webster. Both of these parties testify that the mule was sold to Willis prior to the execution of the deed of trust. By its terms the deed of trust was security only for $40 advanced before its execution, and supplies and merchandise to be advanced after that time, during the year 1884. If the $40 previously advanced and the supplies and merchandise subsequently advanced were paid, then the deed of trust was satisfied, and appellee had no cause of action, and the instructions asked by appellant to this effect should have been given.

Reversed.

GOODBAR & CO. v. LILLIE AND SALLIE WEST.

Attachment — Claim of Fund — Contest Between Creditors.

An attaching creditor cannot avail himself of errors committed in the suit of a third party against the same defendant, it being strictly the privilege of the debtor to make objections to such irregularities therein.[1]

Same — Lien — Validity.

A lien is created by an attachment against a debtor, and a bill by a third party enjoining further proceedings under said attachment merely puts in issue the validity thereof.[2]

1

One who has attached property cannot take advantage of mere irregularities in prior attachments. Hence a bill is not maintainable by such creditor to vacate a senior attachment on the ground that it was sued out in the name of a mere equitable owner of a note, the same having been indorsed to another as collateral security. Jones *v.* Moody, 59 Miss. 327.

And a judgment overruling the motion of an attaching creditor to vacate the levy of a senior attachment on cotton in the field will not be disturbed where the record fails to show a valid levy by the junior creditor. Whatever may be true of the validity of the levy, the junior creditor cannot question it unless he has procured such a levy upon the property as will give him precedence. Scharff *v.* Chaffe, 68 Miss. 641, 9 So. 897.

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Statement of the Case.

On February 17, 1883, O. F. West and J. H. McPeak made a sale of their stock of goods, wares, and merchandise to one John L. Kline, which was declared fraudulent afterward, in April, in a suit by R. T. Abby against West & McPeak, in which Kline filed a claimant's issue, whereupon Lillie and Sallie West, minors, and sisters of O. F. West, filed their attachment suit against the firm of West & McPeak for an indebtedness of $600 each due them for borrowed money, by said firm, through O. F. West, their guardian. And a few days thereafter, on April 17th, appellants, Goodbar & Co., filed their bill in the Chancery Court to cancel and set

The ground on which a junior attaching creditor may procure the vacation of a senior attachment is that it operates as a fraud on him. Henderson *v.* Thornton, 37 Miss. 448.

2

Under the express provisions of Rev. Code 1892, § 147, the lien of attachment *held* not displaced by execution of forthcoming bond. C. D. Smith & Co. *v.* Lacey, 38 So. 311.

A judgment in attachment does not create a lien on the property attached, but consummates and perfects a lien initiated by the levy. Redus *v.* Wofford, 4 S. & M. 579.

The execution by defendant of a replevy bond, under the Act of 1843 (H. C., p. 819, art. 14), which bond is conditioned to have the property forthcoming to abide the order or decree of the court, does not destroy the lien created by the levy of the attachment, which lien, if consummated by a judgment, dates from the levy, and is superior to all other liens created subsequent to that time. Gray *v.* Perkins, 12 S. & M. 622; Montague *v.* Gaddis, 37 Miss. 453.

The right to an attachment and the proceedings to enforce the right, being wholly regulated by statute, it is only by compliance with its terms that the lien can be acquired or retained. Pfeifer *v.* Hartman, 60 Miss. 505.

An attaching creditor, though without a judgment, has such lien upon the property as will entitle him to enjoin its sale under a fraudulent attachment for rent sued out by a third person. Cogburn *v.* Pollock, 54 Miss. 639.

A creditor who, after an insufficient levy of a writ of attachment, files a bill to set aside as fraudulent a conveyance made by the debtor to his wife before the attachment, and thereby fixes a lien under Code Miss., §§ 1843, 1845, has priority, though the decree setting aside the conveyance, and subjecting the land to his debt, is not rendered till after judgment for plaintiff in the attachment proceedings. People's Bank *v.* West, 7 So. 513.

Where the interest of one tenant in common was attached, and the other tenant, with notice thereof, took a conveyance of the former's interest in satisfaction of a debt, after a sale of the land under the attachment, at which the plaintiff in the attachment became the purchaser, a decree of partition was properly made, as by the conveyance the tenant acquired only a right to pay off the lien of the attachment, which right was lost by the sale. Saunders *v.* McLean, 4 So. 299.

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aside the sale to Kline, on the ground that it was fraudulent, and to enjoin the attachment proceedings of Lillie and Sallie West for the same reason, and seeking to subject the stock of goods to the payment of their debt of $642.54. In answer to which O. F. West denied the allegations of a fraudulent transfer, and alleged that he, as the guardian of Lillie and Sallie West, loaned to the firm of West & McPeak, of money belonging to his wards, $748.72, taking the notes of said firm in two equal amounts therefor, and that he, as an individual, owed to said minors $451.28, making a total indebtedness due said wards, $1,200.

This answer was accepted by and made the answer of J. H. McPeak, and the same answer made by O. F. West, guardian. A writ of sequestration was issued on the injunction and a motion was made to quash same, and to dissolve the injunction, and on the hearing the injunction was modified in so far as to allow the said Lillie and Sallie West to prosecute their suits against the firm of West & McPeak to judgment in the Circuit Court of Tunica county, and was made without prejudice to the complainants. The suits of Lillie and Sallie West were prosecuted to judgment without opposition of the defendants thereto, no objection being made to any irregularities in sheriff's return or otherwise. From the decree of the Chancery Court dismissing complainants' bill and sustaining the attachment of the minors, complainants appeal.

APPEALED from Chancery Court, Tunica county, J. G. HALL, Chancellor.

Affirmed, February 2, 1885.

Attorneys for appellant, Malone & Watson.

Attorneys for appellees, Oglesby & Taylor.

Brief of Malone & Watson:

Complainants having acquired a valid lien on the property of West & McPeak, by their proceedings in this cause, have the right to have the attachment proceedings of Lou West, Next Friend, *v.* West & McPeak, begun at law, vacated, if for any reason plaintiffs in said action at law have failed to acquire a valid lien on the property in controversy, for, if they failed to acquire a valid lien,

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the attachment proceedings operate to hinder and delay complainants in the collection of what is admitted to be a joint demand, and are a fraud on their rights, and a court of chancery will enjoin perpetually further proceedings so far as they affect the property in controversy. Henderson *v.* Thornton, 37 Miss. 448; Cogburn *v.* Pollock, 54 Miss. 639.

There was actual fraud in the attachment proceedings. (As both cases at law are identical, we will discuss only one of them.) The attachment was brought about by O. F. West. He went to his sisters and told them he had made a fraudulent conveyance to Kline, and that other creditors would probably attach. * * *

West's intentions were certainly fraudulent, and, this being so, it is not material whether the plaintiff participated in the fraud or not. West procured the attachment to be run, and he was the prime mover therein. Harney *v.* Peck, 4 S. & M. 229; Farmers' Bank *v.* Douglass, 11 S. & M. 469.

If mistaken in this, the fact that the amount claimed in the affidavit for attachment was nearly twice as great as the amount really due, and the subsequent proceedings in the attachment proceeding dissolved the attachment in so far as the rights of complainants are to be affected by it. * * * Drake on Attachment (5th ed.), § 282, and subsequent sections to section 287, as to what will dissolve an attachment.

This attachment operates as a fraud upon the rights of complainants because the attachment was brought by plaintiff in her own name for $600, when it turns out that no such sum is due her, and in fact nothing is due her, but the attachment proceedings are attempted to be proceeded with on a note due O. F. West, guardian, for $374.36, bearing date April 23, 1881, and payable one day after date. This is not a claim upon which attachment at law can be founded. The legal title to said chose in action was in O. F. West, and he alone could sue on it. The plaintiff, having no legal title, could not sue. Chambliss *v.* Vick, 34 Miss. 109; Falls *v.* Wilson, 2 Cush. 168; Newell *v.* Fisher, 2 Cush. 392; Beard *v.* Griffin, 10 S. & M. 589; Wilson *v.* McElroy, 2 S. & M. 241; Ecford *v.* Hogan, 44 Miss. 398; Dowell *v.* Brown, 13 S. & M. 43, especially. * * *

In Mississippi the Code sets out the character of indebtedness which may be collected by attachment. You may attach for demands founded upon any indebtedness or for the recovery of dam-

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ages for the breach of any contract, express or implied, or for claims founded upon any penal statute. Code, § 2414.

And no attachment can be brought for any demand not designated in the statute. Fellows *v.* Brown, 38 Miss. 541. * * *

When a bond is made payable to three persons, an action by one of the obligees cannot be supported by proof of the bond, and this rule cannot be escaped by a declaration setting forth special circumstances to show that the other obligees had no interest in it. The suit should be brought by all the obligees or in the name of all for the use of one.

A judgment covered by the variance will not bar another suit properly brought. McMahon *v.* Webb, 52 Miss. 424.

So O. F. West, guardian, could institute the proper action on the two notes, and the attachment proceedings would not be plead in bar of his action. * * *

The complainants stand in the shoes of the defendants to make such defense to the attachment proceedings as the defendants could and ought to have made thereto. * * *

There is a fatal variance between the affidavit and writ and the declaration in the case, the affidavit and writ being for $600 and the declaration on a note for $374.36. The note is alleged in the declaration to be due the minors. On the proof it is shown to be payable to O. F. West, guardian. The note is not filed with the declaration as required by section 1540 of the Code. By this section it is made a part of the record, and a judgment by default is not valid if this provision is not complied with. See George's Digest, p. 583, tit. "Practice," subtit. "Judgment by Default," and authorities there cited.

When the note is brought out in the evidence, there is a fatal variance between that and the note described in the declaration, so that no judgment could rightfully have been taken on it. Carter *v.* Perkins, 51 Miss. 423.

The Circuit Court acquired no jurisdiction of the attachment proceedings, because the writ was served and returned by a constable. 46 Miss. 544; 55 Miss. 101.

Sarah Bate *v.* Peter Crow, 57 Miss. 676, does not overrule or disturb the rule laid down, but recognizes it as law, and in that case there was an appearance and plea to the writs. * * *

The defendants in this suit in chancery stand squarely upon their rights acquired by their attachment at law. There is no cross-bill, no assertion of any equity, nor prayer for relief on that

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account. We have been unable to find any case at law or in equity where the ward could sue the debtor of the guardian on a note executed to the guardian, or on any obligation made to the guardian, and hence we conclude that such a proceeding could not be maintained.

The nearest approach to similarity in this case and any reported case we have been able to find is that of The King of Spain *v.* R. & J. Oliver, Pet. Cir. Ct. Rep. 276.

That was an action by the King for certain duties on shipments made by the defendants. The privilege of making these shipments had been conferred on Francis Ouverd & Co., and the Olivers derived their rights from Ouverd & Co. The court held that the King could not recover the duties due him from the Olivers, saying: "There is no principle of law which will sanction an action by the creditor against the *debtor of his debtor* upon the ground of contract, for there is no privity between them." * * *

Brief of Oglesby & Taylor:

* * * The second proposition announced by appellants' attorneys in their brief, "That claiming in appellee's declaration a sum *less* than the amount stated in their affidavit for attachment vitiates it," is clearly untenable and is not supported even by the authorities they cite. The principle announced in the cited authorities, and which we clearly recognize as correct, is simply this: That the attaching creditor cannot, after the beginning of his suit, so alter or change his demand as to increase his indebtedness to the prejudice or injury of another attaching creditor. This principle had its foundation upon the theory of fraud; but we nowhere find that the attaching creditor forfeits his lien by *lessening* his demand. Instead of this being a *prejudicial* act, it is a *beneficial one* to the other creditors, as it leaves more surplus to be applied to their debt. The word "changing" used in Drake is used as a synonym for "increasing." Certainly no court ever meant to say that if a creditor, believing that $1,000 was due him and, attached for that amount, could not, when he ascertained that only $700 was due him, change his demand by declaring for the lesser amount, the sum actually due. This is sustained by Drake, in section 287 and preceding sections, to which attention of the court is called.

The position of appellants, that the minor appellees could not sustain the attachment by their next friend, and could not sue by

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prochein ami, as they had a guardian, seems to us to be the only question of interest in the case. Before discussing the right to maintain this action, we claim that appellants cannot take any advantage of such defect, if it be one. That this could only be done by proper plea in abatement by the defendants, in the Circuit Court, and that after judgment it cannot be done even by the defendants in that case, and certainly it cannot be attacked collaterally by appellants. 1 Am. Dec. 28; 11 Vt. 293. * * *

The remedy by attachment is given for an action founded upon *any* indebtedness, etc. Code, § 2414. Whether express or implied. Id. And while it may be said that the legal title to the notes of West & Peak was in O. F. West, yet, as between West & McPeak and the minors, the money obtained by West & McPeak was an *indebtedness* to the minors and one they could sue for by next friend, independent of the notes.

If the guardian, who was a member of the firm of West & McPeak, neglected or failed to protect the interests of his wards, when he knew that his firm was insolvent, and were liable to be attached, even admitting that he had the note in his possession, this would not prevent a next friend from attaching West & McPeak (not upon the note necessarily), but upon the indebtedness, the money had and received by that firm which was the property of the minors. They had a sufficient legal interest in the indebtedness to authorize suit by next friend to protect and preserve their rights. * * *

The guardian was a member of that firm; they had made fraudulent conveyances; were liable to attachment; the guardian knew this, yet he would not protect the estate of his wards; would not *attach* or *sue* himself, and there was an exigency which admitted of *no delay* and made it imperative for some next friend to protect these girls who were about to be defrauded of their small patrimony. That such action is maintainable is sustained by the following authorities: Thomas *v.* Dike, 11 Vt. 273; 1 Am. Dec. 28; Hardy *v.* Scanlan, 1 Miles (Pa.), 87; Cannon *v.* Hemphill, 7 Tex. 184; Robson *v.* Osborne, 13 Tex. 298; Tyler on Infancy, p. 198.

In Hardy *v.* Scanlan, 1 Miles, 87, the guardian made affidavit that he did not bring nor authorize the bringing of the suit, and expressed a desire that it be dismissed, yet the court permitted suit to be prosecuted by *prochein ami.* * * *

Counsel are mistaken, we think, in the assertion that O. F.

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West, guardian, could, notwithstanding the suit by *prochein ami*, Lou West, bring suit and recover upon the notes. The notes were but evidences of debt, and if the minors by next friend sued and recovered the indebtedness, whether upon the notes or upon an action for the money had and received, they would be precluded and barred by the result of that suit, and that judgment could be pleaded in bar of another suit for the same debt. See 13 Tex. 306; Tyler on Infancy, 198; 7 Tex. 184.

We think from the authorities above cited that it is well settled that the minors could sue by next friend, especially in this case where their testamentary guardian was both the guardian and also a member of the firm of West & McPeak, a *debtor to his wards.* * * *

The objections to the declaration in the Circuit Court, we do not think, can avail appellants after judgment. While perhaps they are inaccurately drawn, and ought perhaps to have had other and different counts than were stated, yet as no demurrer or other objection was had to them in the Circuit Court, appellants could make none.

But suppose the proceedings are so irregular as to have the court to say that the judgment is voidable, then they cannot attack it collectively, and authorities are not needed in support of that proposition. If *void,* we *lose* on behalf of appellees no *rights;* nor do the appellants *acquire any.* If it be void, mere "*brutem fulmen,*" we as well as they can disregard it, and in law the attachment causes are still pending, and at the next term of the Circuit Court the void judgment can be disregarded by us; leave can be had to amend declaration if necessary; the return of the attachment writ perfected and a legal judgment obtained. If conceded that the judgment is void none of our rights are diverted, and from it no rights are obtained by appellants. Freeman on Judgments, 116, 117.

We would still have the lien created by the levy of the attachment, in law (there being no judgment, and a void judgment is none). The attachment suit is still pending in Circuit Court, and unless appellants have shown a right to the property *superior* to the lien given by the attachment, it is immaterial whether any judgment has ever been rendered.

The judgment does not create the lien. Its only purpose is to consummate and perfect it. The levy creates the lien, the judg-

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ment perfects it, and the sale is to ascertain value of the property attached, the title of which was diverted by the levy. 1 How. 43; 4 S. & M. 579; 12 S. & M. 622; 52 Miss. 558.

OPINION.—CAMPBELL, C. J., delivered the opinion of the court:

The controlling principle of this case is settled by Jones *v.* Moody, 59 Miss. 327. The appellants have no right to complain of the irregularity in the suits brought by appellees. It appears that they were creditors of the partnership of West and McPeak, and having obtained a lien by attachment, a court of chancery will not wrest from them their advantage because of irregularity to which the defendants in the attachments did not object.

The appellants are not in a position to complain of the fact that the record does not show that the writs of attachment were returned by the sheriff. It is not material in this controversy that the record does not show this. A lien was created by the levy of the attachments and before their return injunction was issued at the suit of appellants, and their bill merely put in issue the validity of the attachments.

The validity of the judgment subsequently obtained after a modification of the injunction was not put in issue.

Decree *affirmed.*

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D. W. SIMMONS et al. *v.* JESSE PARKER.

Subrogation — Discharge of Liability.

A purchaser of a decree rendered against himself in favor of a creditor, it appearing that he was the real debtor, cannot become subrogated to the rights of the creditor as against a secondary obligor.[1]

Pleadings — New Matter Alleged in Answer.

It devolves upon the respondent to prove new matter alleged in an answer, and in the absence of proof, such new matter cannot avail.[2]

D. W. Simmons and F. C. Simmons purchased of Frick & Co. machinery amounting to $1,400, of which $1,050 was paid in cash, and balance was closed up in a note reserving title to the machinery in the form of a purchase-money lien. D. W. & F. C. Simmons borrowed of Jesse Parker $750 with which to consummate the deal and gave him a mortgage on all the machinery as security therefor. Default having been made in payment to said Jesse Parker, the machinery was turned over to him, and

1

A valid operative judgment may be assigned, yet if the assignee first pay it, it cannot afterward be assigned to him in consideration of the payment; the judgment is then extinguished. Rollins *v.* Thompson, 13 S. & M. 522.

Whether the Legislature can confer on the defendant the power to purchase the judgment absolutely for a sum less than is due on the judgment. *Quære?* But, conceding the power, yet the rigorous operation of the statute requires that a defendant in a judgment, claiming as a purchaser, should have done nothing in acquiring the right, inconsistent with the principles of equity and good conscience. If he can be protected in his purchase at all it must be as an unfortunate debtor, without the means to render that full justice to his creditor, to which the creditor was entitled; and he must have become the purchaser at a fair public sale. Hence, if the defendant interfere at the sale to prevent competition in the bidding, or, if it seems he were possessed of ample means to pay the debt, and he concealed them in violation of his duty, the sale to him will be void. Buckingham *v.* Riggs, 5 Cush. 751.

2

Where facts in avoidance, and not in response to the bill, are set up in the answer, they must be proven; the answer is evidence only when it is responsive to the bill. Brooks *v.* Gillis, 12 S. & M. 438; Miller *v.* Lamar, 43 Miss. 383.

Thus, if the bill charge that defendant executed a bond, and the answer set up payment, that allegation must be proven. Nichols *v.* Daniels, Walk. 224.

So of the bill seeking a rescission of a contract charge as the ground of the

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the notes and deed of trust cancelled. Afterward Frick & Co. instituted a suit in the Chancery Court of Copiah county against D. W. Simmons, F. C. Simmons, and Jesse Parker for the balance of the purchase money for the machinery, and obtained a decree against D. W. Simmons and F. C. Simmons for $369.96, and condemning the sale of said machinery in the hands of Parker and of land owned by D. W. Simmons. Execution was levied and all the property advertised for sale, whereupon Jesse Parker prosecuted an appeal to the Supreme Court. D. W. Simmons and F. C. Simmons purchased and paid to Frick & Co. the amount of the decree rendered against them, seeking thereby to become subrogated to the rights of the said Frick & Co., and attempted to foreclose the execution on the machinery. Parker filed a bill in the Chancery Court asking that the court adjudge the debt due Frick & Co. as being paid by Simmons, the real debtor, and praying that an injunction issue restraining the appellant from any further proceedings against him, and that the lien on the machinery be canceled. In answer to which bill appellants allege in defense that appellee was the real debtor to Frick & Co., he hav-

relief, want of title in the vendor, and the fraudulent concealment thereof, the answer of the vendor that he had procured the title before he sold, but had lost the memoranda of his purchase, and had neglected to take a conveyance, is not responsive to the bill, and is no evidence. Liddell *v.* Sims, 9 S. & M. 596.

And so when the bill charged that the transfer was made unconditionally, but did not call for any discovery as to its terms, and the answer denied this charge, and then set out the terms and conditions of the transfer; it was held that the statement as to the terms, etc., were not responsive to the bill, and not evidence. Dease *v.* Moody, 31 Miss. 617.

Where a bill to foreclose a lien for two notes avers that one is paid, and the answer denies that it is paid, but states that it is assigned, the denial of payment is responsive, and is evidence; but that the averment that the note has been assigned is not, and must be proved. Rodd *v.* Durbridge, 53 Miss. 694.

In an answer which admits the allegations of the bill, averments as to affirmative matters not responsive, but by way of avoidance, are not evidence. Hence, where distributees of the estate of a wife allege that the defendant, her husband, appropriated the personal estate of the wife, and has not accounted therefor, if he admits this, an averment in the answer that his wife gave him her estate, not being responsive, is not evidence. Dyer *v.* Williams, 62 Miss. 302; Parmele *v.* McGinty, 52 Miss. 483; Park *v.* Bamberger, 52 Miss. 565; Rodd *v.* Durbridge, 53 Miss. 694.

The burden of proof is on defendant as to affirmative matter. Osborne *v.* Crump, 57 Miss. 622.

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ing assumed to pay said outstanding lien whenever it became due, and also alleging that part of the money used to pay off the judgment of Frick & Co. was obtained from a Mr. Hartman, and that he was part owner of said assigned decree.

From a decree sustaining the bill and adjudging the payment to Frick & Co., as settlement of the judgment, defendants appeal.

APPEALED from Chancery Court, Copiah county, E. G. PEYTON, Chancellor.

Affirmed, May 24, 1886.

Attorney for appellant, A. C. McNair.

Attorney for appellee, Benj. King.

Brief of A. C. McNair:

* * * The pivotal in this case, I take it, is the relation, the legal relation, existing between the appellants and the appellee as to the debt due Frick & Co.,and the relation of the machinery in question to that debt. If Parker, at the time he purchased the machinery from the appellants, expressly agreed in part consideration of the sale and delivery of the property to him by appellants to pay the debt, he became, as between the parties to the agreement, at least, the principal and the appellants the sureties. *A fortori* is such the case when the owners and holders of the debt, Frick & Co., recognized his assumption, and alleged and relied on it in the bill filed by them to enforce payment, and took and introduced at the trial evidence thereof. Brandt on Suretyship & Guaranty, §§ 20, 21, 22, 23, and 24; Miles *v.* Watson, 7 Sweeny (N. Y.), 374; Cornell *v.* Prescott, 2 Barb. (N. Y.) 16; Marsh *v.* Pike, 1 Sandf. Ch. 210; Smith *v.* Shelden, 35 Mich. 42; Calgrane *v.* Tallman, 67 N. Y. 95. * * *

On this point in Jones on Mortgages, vol. 1, § 758, it is said: "The grantor becomes the surety of the purchaser and might file a bill against him and the mortgagee to compel the purchaser to pay the debt directly to the mortgagee, or at least so much of it as might be left after exhausting the mortgaged premises." 1 Jones on Mortgages, § 741, and authorities cited.

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When the assumption of Parker to pay the debt came to the knowledge of the holders of the notes, Frick & Co., they were bound to observe, and they did observe, the relation of the parties with reference to the debt, as is shown by their endeavor through their attorney, Mr. Purser, to collect from Parker without suit, and in afterward alleging and proving the fact in the suit to subject the property in Parker's hands. Colgrove *v.* Tallman, 67 N. Y. 95.

This court has announced and enforced the same principle in Swan *v.* Smith, 57 Miss. 548. * * *

Parker purchased the property with full knowledge (adjudicated by the decree), of the fact that the holders of the notes and the appellants had designated and set apart this property as a security, a fund, from which payment was to be made and demanded and he is charged with notice of the equitable right of the holder of the mortgage to proceed against that fund in his hands, and of the right of the appellants to require the fund to be exhausted before resort is had to another. * * *

The principle is announced in the books, that when the owner of property incumbered by mortgage executed by him sells it subject to the incumbrance, in equity the property becomes the primary fund for the payment of the debt, and that the vendor occupies the position of a surety, and upon payment of the mortgage debt is entitled to be substituted to all the rights of the creditor the same as any other surety. Brandt on Suretyship & Guaranty, §§ 20, 24; Jackson *v.* Link, 51 N. Y. 333; Barnes *v.* Mott, 64 N. Y. 397; Calvo *v.* Davis, 8 Hun, 222; 1 Jones on Mortgages, § 740, and authorities cited. * * *

Having successfully demonstrated, I hope, that in either phase of the case, first, on the theory of an express assumption by Parker of the payment of the debt; secondly, of the purchase by him of the property subject to or incumbered by the mortgage (as to this there is no controversy), and that the machinery was the primary fund for the debt, it logically and equitably results that the appellants in order to protect the property of both or either, had the right, without an assignment of the decree, to pay the debt, and when they paid they were subrogated to all the rights, remedies, and securities belonging to Frick & Co., and had, it is claimed, the right to enforce the decree by selling the machinery to reimburse themselves for their outlay. This right of substitution, or subrogation, does not arise out of any contract between the parties

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to that effect, but is an inherent or natural equity, growing out of the circumstance that the party secondarily liable has a right to call on the party primarily bound to be reimbursed for every outlay he is compelled to make in discharging the obligation. Conway *v.* Strong, 24 Miss. 665; Short *v.* Porter, 44 Miss. 533; Smith *v.* Swan, 57 Miss. 548; Osborne *v.* Nable, 46 Miss. 449; Berry *v.* Nicholls, 2 Harr. & J. 423; Merryman *v.* State, 5 Harr. & J. 423; Magee *v.* Leggett, 48 Miss. 139; McClurg *v.* Beirne, 10 Leigh, 394, 34 Am. Dec. 739; Potts *v.* Nathan, 1 Watts & S. —, 37 Am. Dec. 456; 1 Story's Equity & Jurisprudence, §§ 495, 582; Brandt on Suretyship & Guaranty, § 260 *et seq.* * * *

In Swan *v.* Smith this court, speaking by Mr. Justice Chalmers, in passing on this question, uses this significant language: "It is well settled in such case that the surety will, in a court of chancery, be subrogated to all the liens, rights, and privileges of the holders of the debt discharged; our statute, Code 1871, section 2250, Code 1880, section 998, giving to sureties and indorsers who have judgments against themselves and others primarily bound the right to execution in their own names against such others is but the statutory adoption in courts of law of a well-settled equitable principle." * * *

In this case there was a purchase of the decree by D. W. Simmons, one of the appellants, and a stranger F. H. Hartman, and an assignment of the decree by the holders, in writing, to McNair, and from McNair to Simmons and Hartman. By the purchase of the decree it was the intention of the parties to keep it alive, the written assignment (a verbal one would have been good) had that effect, and vested in Hartman and Simmons all the rights of Frick & Co., in and to the decree, and all remedies acquired and secured to Frick & Co. by it in law and equity. The assignment expressly authorizes the assignees to enforce the decree in the name of the assignors, and for this reason our position is the correct one. Brandt on Suretyship & Guaranty, § 271, and authorities cited. * * *

The appellant sureties on paying the decree could have, in equity, compelled Frick & Co. to assign to them the decree. Staples *v.* Fox, 45 Miss. 667; Ceager *v.* Brengle, 9 Am. Dec. 516; Conway *v.* Strong, 24 Miss. 665. * * *

But the evidence shows that Hartman, a third party, paid the sum of $200 of the purchase money of the decree, and that it was

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his intention and the intention of his attorney to keep the decree alive. Whatever may have been the effect of the purchase by Simmons, the decree to the extent of Hartman's interest was by the assignment kept in force, and he had the right to enforce it to that extent at least. Morris *v.* Lake, 9 S. & M. 521.

It does not matter that the assignment was to Hartman, a stranger, and to D. W. Simmons. In Magee *v.* Leggett, 48 Miss. 139, where there was a partial assignment by the creditor to Mrs. Magee, it is said, on page 145: "The assignment to Mrs. Magee of part of the judgment gives her an equal right *pro tanto* with the creditor. She would be protected in a court of law (in which the assigned judgment in this case was rendered) in the use of its process to levy the debt compulsorily." * * *

The rights of appellants were not affected by their failure to answer or file a cross-bill in case of Frick & Co. Clark *v.* Wilson, 56 Miss. 753. * * *

The test of *res adjudicata* is said by this court, in Shattuck *v.* Miller, 50 Miss. 391, to be as follows: "To determine," says Judge Simrall, "whether a particular matter has been concluded by a former adjudication, the inquiry is, whether it was involved or could have been, if insisted upon in the former suit. If that suit included within its remedial power the subject of the second suit then it has become *res adjudicata*. For the law does not tolerate the splitting up of a cause of action and a separate suit on the fragments." Land *v.* Kline, 52 Miss. 341. * * *

Tested by the general principle announced, Mr. Parker is certainly estopped as to Frick & Co. * * *

So we take it that appellee is estopped to deny the contract and his consequent primary liability by the decree against Frick & Co. If he is estopped as to them, he is as to Thornton and Simmons, the assignees of the decree, who held it with all of its binding qualities as to Mr. Parker.

We submit that the evidence establishes conclusively that Parker made the promise. It is true he denied it but aside from the question of estoppel, if the court will compare his answer with his evidence in this and other points, it will be driven to the conclusion that he is certainly mistaken. * * *

The answer of appellants is sworn to. In such case the answer is evidence while bill is not, and the rule requiring two witnesses or one witness and corroborating circumstances to overthrow the

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answer denying the allegations of the bill is in force. Code 1880, § 1949; Jack *v.* Bridewell, 51 Miss. 881; Waller *v.* Shannon, 53 Miss. 500.

The answer denied the equity of the bill, and for this reason the court should have dismissed the bill. * * *

The second assignment of error is that Hartman was a necessary party and that the court should have compelled appellee, *ex mero motu,* to have made him a party. This assignment, we think, is not covered by section 1440, Code of 1880, nor is it militated against by Green *v.* Gaston, 56 Miss. 748. * * *

Brief of Benj. King:

The position taken by appellee is this: That D. W. & S. R. Simmons' money was used by McNair in his pretended purchase from Frick & Co. of the final decree; that the clerk of the Chancery Court of Copiah county, who was the commissioner named to execute the decree, did not know that D. W. Simmons and S. R. Simmons' money was so used by McNair in that pretended purchase. If the commissioner could have known that the decree in reality belonged to D. W. & S. R. Simmons and that the assignment was taken in McNair's name for the time being, as he states, what would he have done. Why, clearly acting as a good and sensible officer, for such he was, he would have said, and very properly, Why, Mr. McNair, this satisfies the decree, this is the money of the defendants against whom the personal decree was, and they cannot purchase a decree against themselves. * * *

Yet the defense of the bill of complaint is that, notwithstanding all this secret assigning and transferring of this Frick & Co. decree, which they virtually admit, yet they say that Parker undertook *by parol,* not *in writing,* to pay this debt, which was for the balance of the purchase money in the machinery due by D. W. & S. R. Simmons to F. P. Gravely, that he assumed to pay this debt of 360 odd dollars, which was owing by another. This is directly in the face of the Statute of Frauds. But supposing that this defense was not precluded by the Statute of Frauds, there was no defense made to the suit of Frick & Co. by D. W. & S. R. Simmons, a decree *pro confesso* was taken against them and all the defendants except appellee Jesse Parker who contested every material allegation of the bill of complaint in that case. * * *

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OPINION.— CAMPBELL, J., delivered the opinion of the court:

The advice given by Mr. McNair to his clients was sound, assuming that the facts were as they presented them to him, but the chancellor has found that the real purchaser of the decree was the real debtor, and while it was, in our opinion, doubtful what the truth is, we will not disturb the chancellor's conclusion. The gist of the controversy is whether Parker agreed with Simmons to pay the balance of the debt to Gravely or his assignees. The allegation to that effect in the answer is new matter, and it devolved on the respondent to prove it, and he did not do this to the satisfaction of the chancellor. We are unwilling to reverse, because Hartman was not made a party. If he has any rights they are unaffected by the decree.

Affirmed.

HAMILTON MOODY v. CHAS. GALIGHER.

Judgment — Must Conform to Verdict.

A judgment of the court in a larger amount than that assessed by the verdict of a jury is erroneous.[1]

Instruction.

The legal effect of notice given by a mortgagee of the incumbrance on his stock of merchandise, to an agent of a proposed creditor, should be submitted to the jury on proper instructions.

Same.

It was error to refuse the following instruction: "The court instructs the jury, if they believe from the evidence the plaintiffs, prior to any dealings with defendant, had knowledge and consented to the defendant merchandising with a deed of trust held upon his stock by a third party, they will be warranted in finding that the attachment was wrongfully sued out."

Appellees attached the stock of goods of appellant on the ground of fraudulent assignment for the purpose of defrauding his credit-

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Where the verdict is for too small an amount the court cannot correct it by adding thereto what was omitted. The damages on a protested bill are to be included in the verdict, and are not to be added by the court. Buck *v.* Little, 2 Cush. 463.

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ors, and levied on merchandise to the amount of $200, as shown by the sheriff's return. Appellant filed a plea in abatement, denying all the allegations. Evidence introduced by defendant below showed that, prior to his purchase of the bill of goods sued on by appellees, he had given to John P. Richardson & Co. a deed of trust on his entire real and personal property to secure them for advances made to him and merchandise furnished, and that he had retained the property, goods, wares, and merchandise in his possession and control the same as before the execution of said trust deed. That, at the time of the sale to him by plaintiffs, he had informed their agent of the existence of this trust deed, and that the agent told him "that would make no difference to them. They would sell him the goods." That afterward, in consideration of John P. Richardson & Co. granting him further time in which to pay the amount due on the first trust deed, he executed to them a second deed of trust on the same property, and the former one was canceled.

On the trial of the cause, the attachment was sustained and the verdict of the jury was as follows: "We the jury find for the plaintiffs and assess their damages at the sum of $172." Whereupon a judgment of court was rendered for *$200*, and costs.

From this judgment defendant appeals.

APPEALED from Circuit Court, Copiah county, T. J. WHARTON, Judge.

Reversed and remanded, February 23, 1885.

Attorneys for appellant, Calhoon & Green.

Attorney for appellee, Joe Purser.

Brief of Calhoon & Green:

* * * Moody actually told the man who was trying to sell him goods all about the deed covering his stock, and that he did not

In a criminal case, where the verdict is right, but the judgment erroneous, there will be a reversal, but the case will be remanded for the proper judgment. Dick v. State, 53 Miss. 384.

If the value of the property be not assessed it is error to render judgment for the whole of plaintiff's demand against the sureties. Phillips v. Harvey, 50 Miss. 489.

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like to trade with any one except the beneficiaries in it, as he might "come to grief" because of it, and yet plaintiffs sold him, saying it made no difference about the deed, whereupon the court charged the jury that the deed was "void in law and sustains the attachment, and the jury will find for plaintiffs," and refused defendant's charge that it was harmless if plaintiffs had notice. A deed of trust like the present one, if recorded, as this one was, is not fraudulent *per se*. Hilliard *v.* Cagle, 46 Miss. 341, 342.

The case at bar is stronger than Hilliard *v.* Cagle. There, if the deed had been recorded, it would have been valid; here the deed was not only recorded but the creditor knew of it and consented to it by stating that it made no difference. True, this was the original deed of trust, but the one in evidence is shown to be a renewal of it, and with the same terms contained in it. The creditor knew of and assented to a mortgage to Richardson on the stock of merchandise. If it had been a fraud, he would have been estopped to object to it. A renewal of that same deed of trust with the "now on hand," being of different date, might be said to be a deed not embraced in the original consent. The answer is, that the testimony shows that Moody informed the agent that there was a "running deed of trust upon the entire stock," which, though a mistake in fact, in this, that the mortgage was only on goods on hand, was operative to elicit the consent of the agent to that character of mortgage. The consent was to a mortgage on after-acquired goods. The renewal was on the *after-acquired* goods, though only on that on hand, at the time of its execution. To this deed of trust, or rather to the facts evidenced by it, the consent of the creditor was given and such being the case he cannot afterward say it was fraudulent.

The trust deed under consideration, it will be seen, has not the objectionable feature of conveying *after*-acquired goods as in Harmon *v.* Hoskins, 56 Miss., and Joseph *v.* Levi, 58 Miss. It conveys only the goods "now belonging" to Moody, and, having been duly acknowledged and recorded, ought to be good as to subsequent creditors on the mere constructible notice of the record, much more so as to creditors subsequent and with *actual notice*. It is not obnoxious to any provision of the Statute of Frauds but meets all the requirements of Code, section 1293.

The judgment of the court on the verdict was erroneous. The verdict ascertained the debt to be $172, while the court adjudged

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thereupon that defendant and his surety restore the goods replevied or pay $200, their value. Certainly it was enough to require them to restore the goods, or pay the *debt and costs.*

Brief of Joe Purser:

This is a suit based upon account due appellees by appellant, and was begun by attachment. The debt was contracted during the months of September and October, 1883. By looking to the deed of trust, it will be seen that subsequent to the contracting of the debt, and before the attachment was sued out, appellant, H. Moody, executed said deed and thereby conveyed in trust the entire stock of goods upon which he was then doing business as a merchant. By his own statement it will be seen that he remained in possession of the mortgaged property, dealing with the same as his own, selling and disposing of it in the ordinary course of business, and that too with the knowledge and consent of the mortgagee, and was so doing at the time the attachment was issued. Upon the above state of facts there need be no argument, such state of facts warranting Moody's creditors to attach him. 46 Miss. 309.

But Moody seeks to estop Galigher & Son from claiming the right to attach his goods because their agent in the spring of 1883 said to him that it made no difference to Galigher & Son whether there was a mortgage on his goods at that time. We do not think that the principle of estoppel applies in this case.

Does a man by ignoring an act which would under some circumstances not then surrounding him be a fraud upon him thereby forever preclude himself from objecting to a similar act performed subsequently, however fraudulent it might then be? We think not.

The court will certainly hold that Galigher & Son did not estop themselves from attaching Moody when he fraudulently disposed of his goods by mortgaging them as aforesaid, simply because they chose to ignore the act of Moody in mortgaging his goods before they credited him. We hold that Galigher & Son are prior and not subsequent creditors. Their debt was contracted prior to the deed of trust given by Moody, and which was offered in evidence. The deed of trust complained of by Galigher & Son was for a larger debt extending the time of payment about six months and embracing additional property to the one which was in existence in the spring of 1883, the one Moody spoke to the agent

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of. Hence we say there is no error in the record and the judgment should be affirmed.

OPINION.— ARNOLD, J., delivered the opinion of the court:

The verdict for plaintiffs below was for $172, and the judgment should not have been for a greater amount than this sum and costs. The court refused to instruct the jury for the defendant that "If they believe from the evidence, the plaintiffs, prior to any dealing with the defendant, had knowledge and consented to the defendant merchandizing with a deed of trust held upon his stock by a third party, that they will be warranted in finding that the attachment was wrongfully sued out."

The same and the only witness that proved the retention of the property by Moody and his power to control and dispose of the same after the trust deed was executed also testified that the plaintiffs had notice at the time they commenced dealing with him that he was doing business with a trust deed on his entire stock of goods similar to the one on his stock at the time the attachment was sued out. With such notice the plaintiffs had no grounds for attachment shown by the record unless it was afforded by the fact that the first trust deed had been canceled and another with different terms in some respects had been executed on the stock of goods and other property. On the facts of record, the intent with which the last trust deed was executed was an important element in determining whether the attachment was rightfully or wrongfully sued out.

The legal effect of the notice alleged to have been given to plaintiffs through their agent as to the existence of the first trust deed should have been submitted to the jury by instructions from the bench.

Reversed.

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CARVER GIN & MACHINE CO. *v.* S. B. WILMOTH.

Contract — Construction — Commissions Payable on Sales Under.

A contract between parties providing for the payment of a certain per cent. "commission on sales made, when the order is accepted, and such as are cash sales, commissions to be paid when the money is received from the customer, and on that portion represented by notes when the notes are respectively collected," is held to mean that commissions are payable only when the collection of the price of the articlessold is made.[1]

Instructions — Variance with contract.

Instructions as to the payment of commissions under a contract that do not contain the provisions therefor as set out in same are improper.[2]

This was an action in assumpsit on an account of $301 upon which plaintiff recovered judgment with interest. The twelfth page of contract referred to in the opinion is as follows: "The

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The court has the right to impose, as a condition to granting a continuance, that the applicant shall consent to the taking and reading of the deposition of a witness, whose deposition would be unauthorized except by such consent. Hamilton *v.* Cooper, Walk. 542.

Notwithstanding the statute provides that actions of replevin are to be tried at the first term, yet continuance should be granted in replevin cases, just the same as in other actions; and it will, therefore, be error for the court to refuse to *hear* an application for a continuance in such a case. Marshall *v.* Fulgham, 4 How. 216.

A written contract is to be construed by the court and not by the jury. Fairly *v.* Fairly, 38 Miss. 280.

Contracts are presumed to be made with reference to the law in existence at the time they are made. Hence, a promise to pay money, without stating what kind, will mean legal tender. Carter *v.* Cox, 44 Miss. 148.

A contract must be interpreted in the light of the circumstances and conditions under which it was entered into. Tufts *v.* Greenwald, 66 Miss. 360, 6 So. 156; Pratt *v.* Cotton Co., 51 Miss. 470.

In construing contracts of doubtful meaning, testimony is competent to show the relation of the parties to each other, and the subject and the surrounding circumstances, as aids to the interpretation of the language employed, so as to ascertain the intent. Gillenwaters *v.* Miller, 49 Miss. 150.

A cotton buyer was employed "for the cotton season of 1897–98. Said season to begin September 1, 1897, and to last until May 1, 1898," the principal agreeing to pay him "$800 for the season." Early in October the buyer was paid $100 as salary for September. *Held*, that the contract was determined to be divisible by the construction placed on it by the parties themselves. Ramsay *v.* Brown, 77 Miss. 124, 25 So. 151.

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party of the first part agrees to furnish the party of the second part with circulars, blank orders, and notes, and to furnish said machinery to fill orders if taken in conformity with this agreement, so long as they have any of them on hand not engaged, reserving the right to reject any order which they may deem it best for their interest not to fill, and hereby authorize said party of the second part to sell said machinery at the regular prices and terms named in the printed list issued by said party of the first part, for the ensuing season, the purchaser paying freight from the factory," and the letter of May 22, 1882, is in the following words: "Memphis, Tenn., May 22, 1882.— Col. S. B. Wilmoth, Greenwood, Miss. Dear Sir.— Yours 18th at hand. We have tendered our agency at Kosciusko and Granada, but as yet have no reply. We shall

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The court may refuse instructions when there is no evidence applicable to them, and it is not error to refuse a charge, correct in principle, unless the party asking it show the evidence to which it is applicable. Newman *v.* Foster, 3 How. 383; Loring *v.* Willis, 4 How. 383; Miles *v.* Myers, Walk. 379.

Instructions must be applicable to the evidence and pertinent to the questions raised by it, and if not they should be refused, however correct they may be as abstract propositions of law; and if inapplicable and impertinent, the giving of them will be error. O'Reilly *v.* Hendricks, 2 S. & M. 388; Payne *v.* Green, 10 S. & M. 507; Wiggins *v.* McGimpsey, 13 S. & M. 532; Hyde *v.* Finley, 4 Cush. 468; Wright *v.* Clarke, 34 Miss. 116; Lombard *v.* Martin, 39 Miss. 147; Herndon *v.* Bryant, 39 Miss. 335; Dennis *v.* McLaurin, 31 Miss. 606; Fairly *v.* Fairly, 38 Miss. 280; N. O., J. & G. N. R. Co. *v.* Statham, 42 Miss. 607.

It is the duty of the court by instructions to construe a writing, and not refer its meaning to the jury. Insurance Co. *v.* Herron, 56 Miss. 643; Railroad Co. *v.* Anderson, 51 Miss. 829.

And in an action based upon a trust deed its construction is for the court, and an instruction submitting it to be construed by the jury is erroneous. Bowman *v.* Roberts, 58 Miss. 126; Whitney *v.* Cook, 53 Miss. 551.

It is the right and duty of the court to modify instructions so as to make them conform to the law. Wilson *v.* Kohlheim, 46 Miss. 346; White *v.* State, 52 Miss. 216; Scott *v.* State, 56 Miss. 287.

And it is not error for the Circuit Court, of its own motion, to give an instruction in modification or explanation of those prepared by counsel. (Watkins *v.* State, 60 Miss. 323, distinguished.) Warden *v.* State, 60 Miss. 638.

But instructions based upon a state of facts should not be modified unless the facts likewise sustain the modifications. Shelby *v.* Offutt, 51 Miss. 128.

The refusal of an instruction containing a certain qualification, and then giving it with the qualification omitted, against the objection of the party asking it, does not contravene to his prejudice the statute forbidding the voluntary giving of instructions by the court. Snowden *v.* State, 62 Miss. 100.

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not offer any other agencies in that section. It will suit us to pay you 15 per cent. on your sales with acceptable orders and will pay you one-half commission on all Gins and of our manufacture not sold by our agents that we ship into the counties assigned to you and when necessary we shall expect you to call and see any of our customers you sell who need assistance in starting up. Prospects are good. How many catalogues do you want. Yours truly, Jno. D. Milburn, Pres." Plaintiff testified that one Wm. Ray said, "You caused me to buy a gin." This was sold to Ray in the fall of 1881, and commission was claimed on same of $40, and he claimed commission on all orders sold by him, amounting to $391, as shown by itemized statement, and upon which credits for cash furnished and rebates amounted to $90. Defendant filed a counter-affidavit, showing that commissions were due on $940 only, that being the amount of money collected on sales, which at 15 per cent. amounted to $141, of which cash had been paid of $85, leaving $56 due. The first and second instructions are as follows: "1. If the jury believe from the evidence that S. B. Wilmoth was employed by the defendants in 1881 and 1882 to sell their machinery under a contract that he was to receive 10 per cent. on the sales made by him prior to May 22, 1882, and 15 per cent. on the sales made by him after that time, and if they further believe that said Wilmoth sold or caused to be sold the gins, feeders, etc., of defendants mentioned in the account sued on, and that the orders for the same were accepted by the defendant then they will find for the plaintiff the amount of said account with interest at 6 per cent. from the time each of said gins were delivered." "2. That if the plaintiff was employed by defendants to sell their machinery prior to May 22, 1883, at a commission of 10 per cent. on his sales and if they further believe that he sold to Wm. Ray or induced said Ray to purchase from defendant gins, feeders, etc., then plaintiff is entitled to his commission on that sale whether the order was made by Wilmoth or by Ray." First instruction refused for defendant is as follows: "1. The court instructs the jury that plaintiff is only entitled to recover for machines sold by him, for which the price has actually been paid and it is incumbent on plaintiff to prove such payment and the jury will so find." Second and third instructions, which were modified, are as follows: 2. "That plaintiff is entitled to recover his commission on money actually

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paid to defendant or orders accepted by defendants and only when he has complied with the terms of his contract with defendants and it is the duty of jurors to enforce by their verdict the faithful performance of contracts which come before them with impartiality." 3. "In no event is plaintiff entitled to recover on sales of 1881 unless on orders sent by him to defendants or sales made or caused to be made, and the jury will so find." These were modified by the court by striking out of the second the words, "or orders accepted by defendants" and out of the third, the words "or sales made or caused to be made."

From the judgment for plaintiffs defendant appeals.

APPEALED from Circuit Court, Holmes county, C. H. CAMPBELL, Judge.

Reversed and new trial awarded, April 28, 1884.

Attorneys for appellant, Gwin & Noel.

Attorneys for appellee, Hooker & Wilson.

Brief of Gwin & Noel:

There was but little objection made to the introduction of evidence in the court below, and, in consequence, the record is incumbered by considerable immaterial matter, especially in the way of letters, some of which are, however, of considerable importance. The grounds upon which a reversal is asked and expected in this case are presented in two divisions.

Because it was error to allow appellee 15 per cent. commissions, under the contract of 1882, on alleged sales in which the acceptance of the machinery was refused, nothing was collected, and in which appellee had neglected to take any writing from, or to make any binding obligation with, the alleged purchasers; such allowance amounted to $205 interest out of the $301 for which judgment was rendered.

Because it was error to allow appellee 10 per cent. commissions on the gin ordered direct from appellants by Wm. Ray in 1881, at which time appellee had no exclusive territory and was only entitled to 10 per cent. commissions on acceptable orders sent, $40 and interest was thus erroneously allowed. * * *

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The contract bears its own interpretation on its face. The rulings that allowed 15 per cent. commissions "on orders not filled" on machinery "not delivered," on machinery "returned," "on sales represented by notes when the notes are not collected," or "any discounts made for cash or other cause," and in fact the rulings that held otherwise than that "commissions shall only be calculated on the net proceeds" of collections, were not a construction of the contract, but were an abrogation of its only section in which commissions were allowed and fixed, and an elimination of more than half of its words. (See section 14 of contract.)

From the inevitable construction of this section, in the trial below, appellee took refuge under the specious pretext that the terms of the contract were altered by a letter dated May 22, 1882, and signed "J. D. Milburn, Pt.;" and then and there successfully endeavored to narrow down the correspondence had on this subject to that one letter which was written on the same day that was another signed by appellant and enclosing the contracts to appellee. This, too, in the face of one of the instructions contained in the contract and expressly made a part of, and which reads as follows: "Our contracts are intended to specify the exact agreement with agents, and we will not be responsible for any statements, promises, or representations claimed to have been made to them outside of this contract, unless the same is in writing from us or our contracting agent." There is no testimony that Millburn was its contracting agent. He was its president.

As a formal written contract, signed by both parties, is presumed to contain a full and complete expression of the will of both parties in regard to the subject-matter, to the exclusion and nullification of all prior agreements, verbal or written, with which it is in conflict, and as its true date is the day when it received the approval of both, which in this case was June 2, 1882, we would probably be safe in totally disregarding all correspondence prior to that date.

The correspondence prior to June 2, 1882, under a fair construction, will defeat appellee's theory, and fully sustain the plainly intended meaning of section 14. * * *

On May 22, 1882, "J. D. Milburn, Pt." acknowledged the receipt of appellee's letter of May 18, 1882, and wrote, "It will suit us to pay you 15 per cent. on your sales with acceptable orders, and will pay you one-half commissions on all gins of our manufacture

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not sold by our agents, that we ship into counties we assign you, and when necessary we shall expect you to call and see any of our customers you may sell who need assistance in starting up." This is the letter, which, according to the court below, revolutionized the contract. It will be noticed that this letter makes the one-half commissions payable in the same sentence and under the same circumstances as the 15 per cent. commissions, and when it is written in the agreement, commissions are only collectible when machinery is "paid for" just as with the 15 per cent. in section 14. On the same day of previous letter, May 22, 1882, appellant wrote to appellee over its own signature, saying, "Hand you herewith contracts for signature which please sign and return to us. Also fill in blanks at the bottom of first page, saying what territory you want on one of them." On June 1, 1882, appellee replied, saying, "I hand you contracts signed. I changed the contracts as my term of agency will expire November 1st, instead of December 31st. I will however look after your interests of collecting and forwarding or in fact any other interests of company until January," and added a postscript stating, "I want this county, Carroll, Montgomery, Attala, Holmes, you may add Yazoo if that county is not taken, will work it up if I can." To this appellant replied, June 2, 1882, saying, "Enclosed find signed contract. * * * We express you 100 of our new catalogues, blank orders, notes," etc. The receipt of this was acknowledged by appellee on June 13, 1882, and he then expressed regret that Holmes county had not been put in his district, but made no other objection to contract as it then was and now is. * * *

Relying on these facts, we confidently submit that the correspondence neither does, nor was expected to, vary the terms of the contract; and that either under the correspondence or under the contract, appellee's commissions are restricted to 15 per cent. on actual collections. * * *

Notwithstanding all the facts, which were hardly questioned, the instructions for plaintiff really directed the jury to find for plaintiff. As shown by the motion for a new trial, defendant's instructions were so modified as to conform to that idea. If appellee by letter directed appellant to ship machinery to a certain party, which was about all the ordering he did, and appellant acknowledged its receipt, saying it should receive attention, then, under plaintiff's first instruction, he was entitled to his 15 per cent.

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commission on the value of gins as charged, without reference to the value the proof might establish, and the jury would be compelled to allow his account as rendered with 6 per cent. interest. * * *

We will now briefly dispose of the second heading, which concerns only one gin, that purchased by Wm. Ray in 1881.

The correspondence between appellant and Wm. Ray shows that the whole transaction was carried on directly between them, and that the gin was sold at the lowest cash figures, and that appellee was wholly unknown and unmentioned in their transactions, and that appellant never heard of him in that connection until it was all over.

Brief of Hooker & Wilson:

This was a proceeding commenced by appellee by attachment, to recover of the defendants, a (soulless and) nonresident corporation, his commissions on machinery sold for them. A part of the account is admitted to be due. Appellee had two contracts with appellants, the last contract dated May 22, 1882. Under the latter contract he was to receive 15 per cent. commissions. Under the first contract under which he worked until May 22, 1882, he was to receive 10 per cent. commissions.

There was only commissions claimed on this account on one sale that was made to Mr. Ray of Carroll county, under contract prior to May 22, 1882. Evidence shows that while the order was made by Mr. Ray, the sale was in fact made by appellee. Hearing that Mr. Ray was desirous of buying a gin, he went to see him on his plantation in LeFlore county, and fully canvassed the matter, representing to him the many and excellent virtues of appellant's gins, and left with him the circulars, picturing their manifold excellencies. This visit and conversations and representations bore their legitimate fruit, and after some delay (perhaps to let the effects of the fervid eloquence of appellee die away and give his imagination the less and his judgment the more opportunity to assert itself, and examine more carefully into the statements of the agent), Capt. Ray himself makes the order to the company for the gin. It was in his territory and by virtue of the efforts of appellee that the gin was sold. * * *

There certainly can be nothing wrong in the instruction on this point, and the evidence shows that it was through him that the

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sale was made. The instruction on this point is the second instruction for plaintiff. It is certainly a correct announcement of the law. The second contract, as before stated, was a written and printed contract. The whole contest has narrowed itself down to this, that appellants admit the sales, admit that they were acceptable orders, do not claim that they have been in any way damaged or sustained any loss by reason of the breach of the agreement, but simply that they have not collected all that the machinery sold for. In other words, that Wilmoth's commissions were limited to the actual collections made by them, and not upon the acceptable orders. And they base this upon paragraph 14 of the agreement.

The court will notice that the words " when the orders accepted " is an interlineation in writing in the printed contract. The rule of construction is that in documents partly written and partly printed that the writing shall prevail, and another rule is that it shall be construed so as to give effect to the whole unless such construction is manifestly opposed to the intention of the parties.

As originally printed, commissions were only allowed " only on machinery delivered and not on orders not filled nor on machinery returned." The commissions on cash sales to be paid when collection is made from the purchaser, and the commissions on such part of the sales as were represented by notes to be paid when the notes are respectively collected, and to bear the same rate of interest as the notes. The words " when orders accepted " fixes a different time for the payment of the commissions. Under the plain words of the contract he is to receive " 15 per cent. from the list price on each sale of said machinery " (when?) " when the orders are accepted." * * * They have expressly agreed to allow the commissions " when the orders are accepted " — some reason must be given for this interlineation, and no other reason could be given for the insertion of the words. If it is contended that they are inserted as a *description* of the orders on which commissions would be allowed, we say that such is not the ordinary and grammatical construction, and further that there are descriptive words further along in the clause as to the orders upon which commissions would be allowed. To say that they are words of description would do violence to the ordinary sense of the words, to the rules of grammar, and is rendered highly improper by the fact that other words of description are used in a subsequent part of the clause. Under the grammatical construction of the clause,

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appellee was entitled to receive "15 per cent. from the list prices on each sale of said machinery when the orders accepted, and 10 per cent. on presses and 15 per cent. of the list prices on repairs sold," etc. Such is the plain reading, and no ingenuity can change or alter the plain and obvious meaning of the words. In the letter of May 22, 1882, from appellant to Wilmoth, enclosing the contract, they say, "It will suit us to pay you 15 per cent. on your sales with acceptable orders." This letter and the contract embodying the same idea was, as Wilmoth states, the inducement for him to sign the contract and go to work for the company. * * *

We have not been favored with brief for appellant. It has not yet been filed in this court.

There were three instructions asked for by plaintiffs. The second instruction has been adverted to already. The first and third can be considered together. They simply assert that if plaintiff was working for defendant under the contract proven, and sold the gins, etc., testified to, and the defendant accepted the orders for same (whether printed on their blanks or not) and shipped the gins, etc., to the parties purchasing them, he was entitled to recover. On the other hand, defendant attempted to have the commissions limited to the actual collections made by them on the sales, although they had refused to give him any statements or make any settlements with him.

OPINION.— CAMPBELL, C. J., delivered the opinion of the court:

Our interpretation of the contract of 22d May, 1882, under which appellee claims all of the account sued on, except the first item, is that he was not to be paid commissions until the gin and other things sold were paid for. The letter of the appellant of 22d May, 1882, did not modify the contract as to when the appellee was to be paid commissions. It had reference only to what sales he was to have commissions on and not to when he was to receive them. That was prescribed in unmistakable terms by the contract entered into on the day of the date of that letter. The expression "sales with acceptable orders" has reference to the acceptability of the orders to the appellant, and its acceptance by it, for by the twelfth paragraph of the contract it expressly reserved the right "to reject any order which they may deem it for their interest not

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to fill." This furnishes the key to the meaning of the expression "Sales with acceptable orders," which occurs in some of the letters between the parties.

The fourteenth paragraph of the contract is, "14. The party of the first part agrees to allow the party of the second part 15 per cent. from the list prices on each sale of said machinery, when the order is accepted, and 15 per cent. of the list price on repairs sold, and 10 per cent. on presses * * * but only on machinery delivered, and not on orders not filled, nor on machinery returned * * *. The commissions on cash sales to be paid when collection is made from the customer, and the commissions on such portion of the sales represented by notes to be paid when the notes are respectively collected, and to bear the same rate of interest as the notes." From which it is manifest that the time when the appellee became entitled to be paid his commissions was the collection of the price of the articles sold.

There is nothing in the evidence to authorize the instruction that the appellee was entitled to 10 per cent. on the sale to Wm. Ray.

It follows from these views that the first and second instructions for the plaintiff below should not have been given, and that the first asked by defendant should have been given, and that the second and third instructions asked by the defendant should not have been modified, but should have been given as asked. The third instruction for plaintiff should have added to it the words, "for which collection has been made" or other equivalent words, so as to limit the recovery of commissions to money collected on the sales.

No objection was made in the court below to the refusal of the first instruction asked by the defendant, and on well-settled practice, we would not notice that instruction were it not that the judgment must be reversed on other grounds.

Judgment *reversed,* and new trial granted.

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Statement of the Case.

WM. B. HAWKINS and Wife *v.* M. B. COLEMAN, EXR.

Voluntary Conveyance.

A deed voluntarily made to vest title in the grantee, following up an implied wish of a deceased person, is valid and binding against the estate, and will not be set aside at a subsequent date because of matters arising *ex post facto*.

Pleadings — Fraud — Evidence.

To support a bill that charges fraud, the evidence must show that some fraudulent act has been committed.

On September 12, 1875, appellee deeded to Mrs. Matt E. B. Hawkins a tract of eighty acres of land for a consideration of $600, and on January 24, 1884, filed a bill in the Chancery Court of Marshall county, charging that for divers acts of deceit on the part of Wm. B. Hawkins, husband of the said Matt E. B. Hawkins, she was induced to execute said deed, upon his promise to make payment for the land, or a full settlement by way of accounts rendered between complainant and W. B. Hawkins. In 1870 this land was sold to W. B. Hawkins by the late husband of complainant, for which notes were executed, and defendant was put in possession of the land. After the death of her husband, complainant voluntarily executed the deed to wife of defendant, it seeming to be in compliance with the wish of com-

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A conveyance cannot be vacated at the instance of the grantor upon the mere ground that it was made without consideration. Though voluntary it is binding upon him. Day *v.* Davis, 64 Miss. 253, 8 So. 203.

It is not enough in a bill to charge fraud generally; the specific acts must be pointed out. Allegations, if the facts be in the knowledge of the pleader, must be made positively, or, if made upon information and belief, must be charged as true. The averments must be so specific that if taken for confessed a decree might be rendered granting relief. Railroad Co. *v.* Neighbors, 51 Miss. 412.

Where an action is brought to set aside a fraudulent conveyance the facts constituting the fraud should be positively alleged in the bill, if known to complainant, otherwise they should be alleged on information and belief; and hence a petition alleging fraud in general terms only is insufficient. McInnis *v.* Wiscasset Mills, 78 Miss. 52, 28 So. 725.

A bill in equity, to set aside a sale under a deed of trust on the ground of fraud, is demurrable, if it fail to state the facts upon which the charge of fraud is predicated. Weir *v.* Jones, 84 Miss. 602, 37 So. 128.

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plainant's deceased husband to provide defendants with a home. The evidence showed a running account between the late E. W. Coleman and W. B. Hawkins, and that there was never a settlement between them, and long after the death of the said Coleman complainant sought to get the accounts settled, and did have a verbal arbitration, which resulted in a balance shown against defendant W. B. Hawkins of about $826. No evidence was offered showing that defendants used fraud or deceit or solicitation to get the deed made to Matt E. B. Hawkins nor in support of any of the allegations of fraud made in the bill.

From a decree for complainant, canceling the said deed, defendant appeals.

APPEALED from the Chancery Court of Marshall county, B. T. KIMBROUGH, Chancellor.

Reversed and discharged, May 10, 1886.

Attorneys for appellant, Watson & Smith.

Attorneys for appellee, R. S. Smith and Strickland & Bates.

Brief of J. H. Watson:

* * * Now, we submit, an unconscientious advantage is necessarily an advantage obtained by unconscientious means, and if the testimony, even of the plaintiff herself, even tends to show the use of unconscientious means by the defendant in procuring said deed we have wholly failed to discover it. We have already considered the "promises and assurances" which complainant alleges were fraudulently made, and by reference to the testimony itself have shown that no such promises or assurances were made. By the deed the defendant acquired the legal title to the land. This was the object of the execution. As to the unconscientious use the defendants have made of the unconscientious advantage obtained by them over the complainant the record is silent.

Now the bill in this case proceeds solely upon the ground of fraud by the defendant, W. B. Hawkins, in procuring the deed from the complainant to his wife, and, we submit, unless fraud

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is shown in that transaction by the testimony in the case the relief which she seeks must be denied her. "No relief can be granted except upon the case as made in the bill."

The conclusion is irresistible, we think, looking to all the testimony in the case that the complainant did just precisely what she intended to do when she executed the deed to the defendant, Matt E. A. Hawkins. According to the complainant's own testimony, Hawkins made no promise to induce her to make the deed. He promised nothing on condition that she would convey the land to his wife. She wanted to build him up. The defendant was very poor and overwhelmed with misfortune. Just a few days before he had sustained a loss by fire, which made him an object of charity, and which rendered it extremely doubtful whether he would ever be able to pay anything on the debt. He frankly told her his condition, that he did not know that he would be able to pay for the land, *just before* she made the deed. Where in all this case can a single circumstance be found to excite a suspicion of fraud. The complainant herself by her testimony repels the charges made in the bill.

Relying on this deed, the defendant goes to work and builds up again, and more than four years after its execution the bill is filed. Upon the state of facts we see no reason why the Statute of Limitations, of six years to the notes, and of three years to any claim arising out of the new contract which complainant says was made September 12, 1879, is not a complete bar to any recovery on the money and demand, and the absence of fraud on defendant's part certainly is an answer to so much of the bill as seeks to vacate the deed.

Brief of R. S. Stith:

* * * He prepared the deed, under instructions that "the deed was not to release the land;" and again, on the subject of the deed, "she said" to Hawkins, that "he was to understand that the land was not to be released." Yet he went home and prepared a deed that did release the land, and Mrs. Coleman signed it, executed it without reading it or hearing it read. It is true he says he read it to her; but does it not strike the court as a little curious that he locates the old lady, when the deed was being read to her, as standing in the door of her house leading into the cookroom, with no one else present? They had been in the room

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with Mrs. Stephenson a few moments before, conversing about the matter; why not read the deed to Mrs. Coleman then, in Mrs. Stephenson's presence? Why not read it in the presence of the magistrate before whom it was acknowledged? If he had said it was in either presence it might have been contradicted. Hence she is placed in the "door leading into the cookroom," with no one present but himself and Mrs. Coleman. The story is rather fishy, in view of the fact that Mrs. Coleman says so emphatically that "she never read the deed, nor heard it read." Remember, she was a very old lady and unaccustomed to business matters, her husband having but recently died, upon whom she had always relied in these matters. Then was this deed fairly and honestly obtained? Was not this transaction fraudulent? If, after getting such an advantage, unconscientious in the extreme, although his original purpose may have been innocent, he seeks to make an unfair and fraudulent use of it, will the court permit him to do it?

But his defense is, that this deed was made in pursuance of a verbal gift of the land in controversy to Mrs. Hawkins (the wife of said W. B. Hawkins), by complainant's said husband and testator during his lifetime, which complainant approved and promised to carry out, and that said deed was but the consummation of that gift. On this theory, the whole case of the defendants rests. It stamps W. B. Hawkins with fraud in procuring the deed, for when you strip the transaction of the *gift* theory, and then look at the use he is now trying to make of that deed, it is not only an unfair advantage sought to be unconscientiously used, but a bold and naked fraud *ab initio*. * * *.

If he meant no fraud when he obtained the deed, yet, as soon as he found that, by Mrs. Coleman's confidence he had acquired such an advantage, he uses it fraudulently or unconscientiously, the court will not permit him to do it. Dickerson *v.* Mays, 60 Miss. 388; Hart *v.* Boyd, 54 Miss. 547, 550.

But the court below, upon all the testimony in the case, thought there was fraud, and it set aside the deed. This court will not reverse the decree, unless manifestly wrong.

If a decree be right upon the whole case, it will not be reversed because the wrong reason is assigned.

We are confident that substantial justice has been done, and that the decree of the chancellor should not be disturbed.

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As to the power of the complainant to make the deed in this case, under the will of her testator, we refer to the following authorities. Gouldsmith *v.* Coleman, 3 Law & Eq. 328; Water Valley Mfg. Co. *v.* Seaman, 53 Miss. 655, 659, 660; Elliot *v.* Connell, 5 S. & M. 106; Glenn *v.* Thistle, 23 Miss. 45.

Brief of W. M. Strickland:

The deed of September 12, 1879, was procured by fraud and should not be permitted to stand.

The conduct of Hawkins in delaying a settlement with Coleman in his lifetime, and with complainant after his death, and his promise, at the time the deed was made, to settle and pay the balance, and his subsequent refusal to do so, were but parts of a fraudulent scheme to get the land without full payment. He states in his answer to the nineteenth direct interrogatory, that he never did have a settlement with Thos. B. Coleman, "but some few little ones with complainant."

The fact that the land debt was barred, and not paid, did not entitle Hawkins or his wife to a deed to the land. The payment of the purchase money is a condition precedent to the right to be invested with the title. This is positively settled by the case of Cook *v.* Reynolds et al., 58 Miss. 243–251.

Under the general doctrines of equity jurisprudence, courts of equity are not "absolutely bound" by the Statutes of Limitations; and section 2695, Code 1880, does not change the general rule. And where there is the slightest taint of fraud in concealing the true condition of demands between parties mutually dealing, the offending one should not be allowed to acquire any rights by lapse of time.

It is, therefore, submitted for the consideration of the court whether the delay of complainant in filing this bill should prejudice her.

Hawkins' possession of the land did not become adverse until the debt was barred, and only some five or six years had elapsed from that time to the filing of the bill. 62 Miss. 263.

The court will not permit the defendants to avail themselves of the deed of September 12, 1879, because it gives them an unconscientious advantage over complainant. 43 Miss. 666; 48 Miss. 207.

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The gift of the land set up by the defense is too preposterous for serious consideration. In less than two months after the date of the alleged gift, viz., December, 1875, Thos. B. Coleman made his will, giving the property to others. Moreover, he retained possession of the land notes. Viewed in the light of Coleman's conduct, the gift is a most improbable story, altogether out of joint with the reason, experience, and judgment of mankind. Besides, if true, being in parol it is null and void. * * *

OPINION — CAMPBELL, J., delivered the opinion of the court:

The gravamen of the bill is the charge that the deed made on the 12th September, 1875, was executed under such circumstances as entitled the complaint to have it vacated. It is the lien in her way, and until destroyed effectually stops her progress. Hence the assault upon the deed, which is alleged to have been obtained by fraudulent devices and assurances on the part of Hawkins, who thereby obtained an unfair advantage of the complainant, which he has used *unconscionally* to her detriment. The truth of this averment is the gist of the controversy. We have fully considered the pleadings and the evidence, and reached the conclusion that the bill is not maintained. The testimony of the complainant and her daughter is not in harmony with the theory of the bill, which on its face appears to be improbable. The testimony of both these persons as to the conversation between complainant and Hawkins about the state of indebtedness between them when the deed was about to be made negatives the theory of the bill. It seems strongly probable that the deed was voluntarily made to vest title in the grantee, in execution of the wish of Mr. Coleman in lifetime, concurred in by the complainant at the time of making the conveyance, but which she desired to recede from at a subsequent date, because of matters arising *ex post facto*. It is doubtless true that Hawkins had not paid for the land, and it is unwise in the complainant to convey it to his wife, and thus put it out of her power to coerce payment by controlling the title, but nothing is shown to justify a decree annulling what she did, of her own free will, and without being inveigled by any one, as far as we can discover.

It may be morally just for Hawkins to pay $826, as found by McKinney to be due, but as the notes given for the land are barred by limitation, and have never been legally revived, and the

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charge of fraud made, as to the giving of the deed is not supported, the complainant has not shown any right which a court can enforce.

The fact that Mrs. Coleman under some circumstances could not prejudice the estate makes no difference in this case.

Decree *reversed* and bill dismissed at the costs of the complainant in both courts.

W. F. SIMMONS *v.* C. M. FELDER.

Appeal — Error.

The appellate court will not assume matters of fact raised by counsel, which were not introduced in the court below.[1]

Two bales of cotton in the possession of C. C. Felder were levied on by the sheriff of Pike county under an execution against C. C. Felder in favor of appellant, and C. M. Felder filed a claimant's issue, and on trial before the justice court in Osyka, Miss., the two

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In a suit to remove a cloud from a title a finding by the chancellor against a claim of title by adverse possession for ten years, commencing in February, 1886, will be taken as correct, where the record does not show when the bill was filed. Simmons *v.* Ormond, 27 So. 875.

The objection that the levy of an execution was void because made within four months of the date of filing of the petition in bankruptcy by the judgment debtor will not be considered on appeal, where the record contains no proof of the bankruptcy proceedings. Brister *v.* Joseph Bowling Co., 28 So. 830.

The presumption in favor of the correctness of the judgment of the court below will be indulged until the contrary is shown by the record; and the bill of exceptions must state the case fully enough to enable the high court to determine whether there was error; for where the facts are not stated fully, the action of the court below will be sustained, if it would be correct on any grounds. Balfour *v.* Mitchell, 12 S. & M. 629.

Where there was no proof in the record to show whether a right accrued to the wife before or after coverture a decree of the Probate Court, based on either theory, will be presumed correct. Henderson *v.* Guyot, 6 S. & M. 209.

No objection can be urged against the action of the court below, based on evidence, unless there be a bill of exceptions setting out the evidence. Anderson *v.* Williams, 2 Cush. 684.

If the bill of exceptions does not purport to set out all the evidence every fact necessary to sustain the judgment will be presumed to have been proven, unless the record show the contrary. Stevens *v.* Mangum, 5 Cush. 481.

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bales of cotton were adjudged to the claimant. An appeal was prosecuted to the Circuit Court, and on the trial of the case it developed that the cotton in question was grown by the claimant and belonged to him individually, and that the farm upon which it was grown was located in the State of Louisiana. The cotton was hauled to Osyka upon the wagon of C. C. Felder, judgment debtor. The question of residence of the claimant was raised for the first time on appeal to the Supreme Court in the brief for appellant.

From a judgment for the claimant, plaintiff appeals.

APPEALED from Circuit Court, Pike county, J. B. CHRISMAN, Judge.

Affirmed, March 2, 1885.

Attorneys for appellant, J. J. Stokes and J. C. Lamkin.

Attorneys for appellee, S. E. Packwood and J. B. Sternberger.

Where exceptions were taken and reserved only to the competency of the deposition the party introducing it should see that the proof of notice, on which it is taken, is inserted in the bill of exceptions. The high court will not presume that notice was proven or dispensed with in the court below. Pickett *v.* Ford, 4 How. 246.

No question can be adjudicated here which was not the subject of decision in the court below. Byrd's Case, 1 How. 163.

This court, in reviewing the action of the court below, refusing a motion for a new trial, will notice no other grounds than those specified in the motion. Barney *v.* Scherling, 40 Miss. 320; State *v.* Farish, 1 Cush. 483.

The record is the only medium by which this court can examine any question presented to the court below. Green *v.* Robinson, 3 How. 104.

This court can act only on the record from the court below, which contains a case sufficiently certain to enable the court to determine what it is. Carraway *v.* Board of Police of Yazoo Co., 1 How. 23.

And this court can notice nothing not properly a part of the record, though embraced in it. Kibble *v.* Butter, 14 S. & M. 207.

This court will not entertain questions not raised below. Anderson *v.* Leland, 48 Miss. 253; Griswold *v.* Simmons, 50 Miss. 137.

In the absence of a bill of exceptions this court will assume that the judgment rendered in a case was proper, provided any state of facts could exist under the record in which the judgment rendered would be proper. Bernheim *v.* Brogan, 66 Miss. 184, 6 So. 649.

This court will assume that a verdict is correct, and will not disturb it, if

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Brief of J. J. Stokes:

The facts which are shown in evidence, and which are not disproved, *i. e.* that claimant attempted to remove the cotton from the State, that the judgment debtor, in the presence of the claimant, asserted that the cotton belonged to James Morris and called upon Morris to claim it; that the judgment debtor insisted that the officer making the levy should mark the cotton with Morris' name, the claimant being present, and the decidedly significant fact that no notice was given that this claimant here had any interest, and that no claim was made until two days after the seizure of the cotton, are amply sufficient, we think, to prove fraud and collusion between the judgment debtor and this claimant, to defeat the levy and save the cotton for the former.

If it be true that this claimant grew the cotton with the consent of his father and mother, it is still liable to the execution for his father's debt unless the claimant had been emancipated, be-

no motion was made to set it aside, and there is no error in the rulings of the court specially excepted to during the trial. Telegraph Co. *v.* Jones, 69 Miss. 658, 13 So. 471.

If, in a bill of exceptions, a certified transcript of the record of a deed shows the date of recording, but fails to show when it was filed for record, this court will not, in the absence of evidence on that point, assume that it was filed at an earlier day, though the date of its execution is earlier. Davis *v.* Netterville, 68 Miss. 429, 10 So. 32.

Where the question of the residence of testatrix was, by agreement, submitted on testimony not contained in the bill of exceptions, the finding of the court will be affirmed. Pratt *v.* Hargreaves, 75 Miss. 897, 23 So. 519.

Where the trial court, after material evidence was introduced, erroneously withdrew the same from the jury, and without such evidence the facts were not sufficient to sustain the judgment, the cause will be reversed on appeal, as the Supreme Court could only consider the facts submitted to the jury. Marks *v.* Price, 27 So. 600.

Where the application for a continuance does not appear in the record, it will be presumed that it was rightly refused. Holden *v.* Brimage, 72 Miss. 228, 18 So. 383.

The Supreme Court, on appeal in a criminal case, in passing upon the action of the trial court in denying a continuance, is confined to the record and cannot consider a certified copy of a subpœna issued for a witness nor an affidavit averring that he was present in court during the trial of the case, such papers not having been of record in the court below at the time of the trial. Whit *v.* State, 85 Miss. 208, 37 So. 809.

An affidavit not a part of the record cannot be considered by the Supreme Court in aid of the same. Jenkins *v.* Barber, 85 Miss. 666, 38 So. 36.

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cause he was a minor and subject to and supported by his father. Hamilton *v.* Booth, 55 Miss. 60.

If the claimant was emancipated, he must have been emancipated under the laws of Louisiana, being a resident of that State. No effort was made to prove that he had been emancipated. The laws of Louisiana require that in order to emancipate a minor, he must be of the full age of fifteen years, and that a declaration shall be made by the father or mother that he (or she) does emancipate the minor before a notary public in the presence of two witnesses. The mother to act only in case of the death of the father. Civil Code of La., art. 369.

It was attempted to show that the land on which the cotton was grown belonged to the claimant's mother and that she allowed him to cultivate if for his own benefit. If that were so, it does not change the standing of claimant. He was not emancipated and under the laws of Louisiana all property, whether real or personal, is community property and all profits or revenue arising therefrom belong to the husband, and all debts created during the marriage must be acquitted out of the common fund. Civil Code of La., arts. 2369, 2370-2373.

QUESTION OF JURISDICTION.

Brief of J. C. Lamkin:

The amount in controversy in this case is the value of two bales of cotton levied on by the constable — the question tried before the Circuit Court was not as to the amount of the execution, but whether or not two bales of cotton claimed by C. M. Felder could be subjected to the payment of the execution. While this is an appeal to the Circuit Court from a justice of the peace and the amount of the execution does not exceed the sum of $50, the amount of the execution was not in controversy, and the only thing in controversy was as to the ownership of two bales of cotton which is valued by the officer at $100. The cases of O'Leary *v.* Harris, 50 Miss. 13, and 51 Miss. 202, do not apply in this case; section 2354, Code of 1880, does not exclude this appeal.

It is evident from the testimony in the case that C. C. Felder used his son, the claimant, to perpetrate a fraud upon the plaintiff in execution. There is nothing to show that the son had been

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emancipated, and while a creditor cannot compel the son of his debtor to work for him, still, unless emancipated, the earnings of the son are liable for the father's debts. 50 Miss. 60.

The judgment debtor and claimant lived in the State of Louisiana and there the mere fact of the father allowing his son to cultivate land, being part of the same land cultivated by the father, will not amount to emancipation. Civil Code of La., art. 369.

Clearly under the state of facts the court should have granted third instruction asked for by plaintiff, and should have refused the instructions asked for by the claimant.

The jury, under all the statements of the facts as shown in the record should have brought in a verdict for the plaintiff.

ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

Brief of Packwood & Sternberger:

This case should be dismissed, as the "amount in controversy" (which means, we take it, the original judgment in the suit), does not exceed the sum of $50. Code, § 2354; 51 Miss. 202; 57 Miss. 826; 59 Miss. 362.

It may be contended that the amount in controversy, in the language of the statute, means the value of the cotton in this case, and not the amount of the original judgment. But, if this be the proper construction of this statute, and a rule of this kind were to obtain in cases involving the claimant's issue, carried up to this court, the inevitable result would be that this court would be called upon to decide cases involving this issue where the original amount in controversy was any sum under $50, no matter how contemptible. As a matter of public policy can this court afford to give the statute such a construction?

Aside from this, however, there is nothing in the record to show the value of the cotton. For aught this court can know, at the time these two bales of cotton were seized they were not worth $50.

A father may partially or wholly emancipate his minor sons. Children cannot be compelled to work for the benefit of their father's creditors. In other words, if the father retains the labor of his children for himself, its fruits are liable for his debts; but, if he *do not* retain their labor, then its fruits *are not* liable for his debts. Hamilton *v.* Booth, 55 Miss. 60.

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Statement of the Case.

OPINION.— COOPER, J., delivered the opinion of the court:

It appears by the record that the cotton in controversy was grown in the State of Louisiana, but it does not appear that the claimant was domiciled there. We cannot assume this fact.

Judgment affirmed.

SOUTHERN TELEGRAPH CO. v. ALABAMA GREAT SOUTHERN RAILROAD CO.

Construction of Code Sections.

The Code of 1880 which re-enacted, consolidated, and revised the provisions of law relating to the construction of telegraph lines, repeals all former acts of the Legislature relating thereto.[1]

This is a proceeding authorized by an act of the Legislature of the State of Mississippi, entitled "An act to facilitate the construction of telegraph lines in the State of Mississippi." Approved April 5, 1876, page 229, sheet Acts of 1876.

The record shows that all the requirements of that act were strictly complied with. The monition and notice were issued and executed as therein provided for, commissioners were summoned,

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Section 3, chapter 1, Code of 1880, reads as follows: "From and after the said 1st day of November, 1880, all acts and parts of acts, the subjects whereof are revised, consolidated and re-enacted in this Revised Code, or repugnant to the provisions contained therein, shall be, and the same are hereby repealed, subject, however, to any express regulations relating thereto, which may be contained in this Code."

The Act of 1863 (Laws, p. 146) prohibiting railroads from making contracts limiting their common-law liability was repealed by not being brought forward in the Code of 1871. Railroad Co. *v.* Weiner, 49 Miss. 725.

Repeal by implication is not favored. The former law, unless changed by express enactment or clear implication, remains in force. Pons *v.* State, 49 Miss. 1; Beard *v.* Lee County, 51 Miss. 542; Smith *v.* Vicksburg, 54 Miss. 615; Deaton *v.* Burchard, 59 Miss. 144; Board of Education *v.* Aberdeen, 56 Miss. 518.

Every affirmative statute is a repeal by implication of a precedent affirmative statute so far as it is contrary though there are no repealing or negative words. Gibbons *v.* Brittenum, 56 Miss. 232.

The Act of February 8, 1890 (Laws, p. 124), entitled "An act to pay off and fund the outstanding debt of Bolivar county and to provide a revenue therefor, and for other purposes," was not revised, consolidated, and re-enacted

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selected, and sworn, as directed by the act. Proof was introduced by petitioner, by the introduction of two witnesses, experts in the building and operation of telegraph lines, who swore that an *easement* was desired for the erection of a line of telegraph poles, sixty yards apart, along the right of way of the defendant from Meridian, in Lauderdale county, to the Alabama State line, where defendant's railroad crosses the same between the States of Mississippi and Alabama; that the poles would be twenty-five feet long, five feet in the ground, and thirty feet from the center of the railroad track; and thus erected, no damage could be done or could accrue to the railroad or to other telegraphic lines, except in competition for business; that the railroad would be benefited by the carrying of the material, officers, and employees of the telegraphic company, besides by the facilities for the transmission of their own orders, etc., in the event their line should, at any time, get out of repair; that railroad companies frequently gave to petitioner the right of way when not hampered by previous contracts with the Western Union Telegraph Company, and in some instances, when the railroad companies are not so hampered, they were enabled to make contracts for the right to erect their line mutually agreeable, without resorting to legal proceedings, but in this instance, petitioner had been unable to effect any arrangements whatever with the defendant; that no actual damage could be done the defendant by the erection of their poles as

in the Code of 1892, nor are its provisions repugnant to any contained in said Code, and, being a purely local law, it was not repealed thereby. Code 1892, §§ 2, 3, and 8; Jones *v.* Melchior, 71 Miss. 115, 13 So. 857.

The subject of said act of 1882 is the conferring of power on cities of a certain class to impose privilege taxes, and, the act being repugnant to section 3412, Code 1892, embracing the same subject, and restrictive of the power of municipalities in that regard, was repealed by section 3 of the Code. Vicksburg *v.* Insurance Co., 72 Miss. 67, 16 So. 257.

Although a statute be not repugnant in all its provisions to a prior one, yet if the later statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the original act. Myers *v.* Marshall Co., 55 Miss. 344; Gibbons *v.* Brittenum, 56 Miss. 232.

Laws 1882, p. 22, chap. 16; Id., p. 19, chap. 15; and Laws 1884, p. 24, chap. 18— one of which acts was to "define the duties of the superintendent of the penitentiary, and for other purposes," and the other "To provide against the mal-treatment of convicts" were repealed by Code 1892, chaps. 23, 101, which "revised, re-enacted, and consolidated" the whole subject relating to the leasing of the convicts, abolished the system, and vested the control of convicts in a board of control. State *v.* Jenkins, 73 Miss. 523, 19 So. 206.

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stated, occupying only one square foot of ground for each pole, the poles being sixty yards apart; that petitioner had succeeded in building its line from New York city to Selma, Ala., and had obtained the right of way along the E—— T—— V—— and G——— railroad from Selma to the State line, between the States of Alabama and Mississippi, and the purpose of this proceeding was to obtain the right of way from that point to Meridian, and thence on to New Orleans. There was no other testimony offered — the defendant offered none whatever — and the commissioners returned their award, giving to the defendant the sum of $5. This proceeding was had on the 1st day of October, 1884. On the 8th of October, defendant filed a motion to set aside the award and grant a new trial or inquest under and by virtue of section 11 of the Act of 1876. Upon the hearing of the motion, a new inquest was ordered, from which plaintiffs appeal.

APPEALED from Circuit Court, Lauderdale county, S. H. TERRAL, Judge.

Dismissed, May 4, 1885.

Attorneys for appellant, Woods & McIntosh.

Attorney for appellee, John W. Fewell.

Brief of Woods & McIntosh:

This is a proceeding authorized by an act of the Legislature of the State of Mississippi, entitled "An act to facilitate the construction of telegraph lines in the State of Mississippi." Approved, April 5, 1876.

The record shows that all the requirements of that act were strictly complied with. * * *

But the learned counsel for the defendant in this court, for the first time, raises the point that the Act of 1876, under which this proceeding was had, was repealed by the Code of 1880. The court will remember that he would not insist upon it, but merely submitted it for the consideration of the court. He is too good a lawyer to seriously contend for such a proposition — that the Act of 1876, containing full, complete, and minute provisions for

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the condemnation of the right of way for telegraph companies desirous of erecting lines in this State, was repealed by section 3, chapter 1, Code of 1880, inasmuch as chapter 38, Code of 1880, being "An act in relation to corporations and other associations," contains, in sections 1065–1070 of that act, some general provisions authorizing the construction of telegraph lines in this State, and prescribing certain duties and fixing certain penalties, but not at all referring to the subject for which ample provision is made in the Act of 1876, to-wit: the method of acquiring a right of way by a telegraph company desiring to erect a line in Mississippi.

The whole of the Act of 1876 is an elaborate scheme, providing in all its details for the methods to be pursued by a telegraph company desiring to acquire a right of way on which to erect its contemplated lines. The Code of 1880, so far from revising, consolidating, and re-enacting any pre-existing laws on the subject of acquiring a right of way by any telegraph company desiring to erect its lines in this State, is absolutely silent on that subject, thus leaving the Act of 1876 in full force.

To say that chapter 38 of the Code of 1880 repeals the Act of 1876 is equivalent to asserting that the Code of 1880, in chapter 38, prescribes the method of acquiring the right of way by telegraph companies in this State. The most casual observation of the Code will satisfy the most ardent repealer that this subject is not at all treated of in the Code, either in chapter 38 or elsewhere. If the Act of 1876 is repealed, it can confidently be affirmed that there is now no law of this State under which a new telegraph company can erect its lines and do business in this State. For, surely, no one will put himself in the untenable position of holding that, when section 1065 of the Code of 1880 declares that all companies incorporated for the purpose of constructing telegraph lines in this State shall be authorized to construct the same, etc., there must not be first a legal condemnation of a right of way on which and along and over which such construction may be had. To assert this fallacious proposition is to assert that the Code attempts to authorize an appropriation of private property by a telegraph company for a right of way, without first making just compensation therefor to the owner. The bare statement of the proposition carries with it its own refutation.

But all argumentation is idle. It is quite as profitable to un-

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dertake to prove that two and two makes four, or that the sun is not apparent to us when concealed from our gaze by a bank of cloud. The mere statement that the method of acquiring a right of way by a telegraph company is not a subject treated in the Code of 1880, and that it is the sole subject of the Act of 1876 referred to, will be sufficient to settle the point, if reference to the Acts of 1876 and to the Code of 1880 shall bear out the statement. It is not a matter for argumentation. It is not a matter of construction of statutes. It is only matter for reference and verification whether there be, indeed, any statute on a given subject in a given Code. * * *

Surely it will not be contended that section 1067, Code of 1880, provides for damages for the condemnation of the right of way of a telegraph line. That section only gives the owner a remedy. In Thompson *v.* Grand Gulf Bank, 3 How. 240, Judge Sharkey says: "It was not designed by the Constitution simply to give the owner a remedy; nor is it a compliance with the Constitution for the Legislature to provide a means by which the owner may acquire compensation." * * *

Brief of John W. Fewell:

The Act of 1876, under which the proceedings of appellant were instituted, was repealed by the Revised Code of 1880.

The subject of the Act of 1876 is "revised, consolidated, and re-enacted" by the Code of 1880 (§ 1065 *et seq.*), within the meaning of section 3 of said Code. The statute (§ 1065 *et seq.*) points out the means by which the right of way for telegraph companies may be condemned. * * *

OPINION.— CAMPBELL, C. J., delivered the opinion of the court:

The act, entitled "An act to facilitate the construction of telegraph lines in the State of Mississippi," approved April 5, 1876, was repealed by the Code of 1880.

Section 3 of that Code, in connection with sections 1065–1070, produced that result. M. & O. R. Co. *v.* Weiner, 49 Miss. 725.

Sections 1065–1070 of the Code of 1880 were merely transferred from the Code of 1871, into which they were copied literally from the Code of 1857, and they rest on the theory that

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constructing a telegraph line is not such a taking of private property as to require due compensation to be first made to the owner. Whether that theory is maintainable is not the question now before us. It is manifest that the subject of the right of way for telegraph lines was dealt with by the Legislature in the Code of 1880, and that the provisions of law on that subject were "revised, consolidated, and re-enacted" in the Code, and, it follows, that sections 1065–1070 contain the only statutory provisions on that subject intended to be preserved.

It follows from this view that the act under which this case was brought was not in force when it was commenced, and, therefore, it is dismissed.

D. S. PATTISON, Exr., et al. *v.* H. H. PATTISON.

Executor — Individual Payment.

Moneys paid by an executor as an individual to a creditor of the estate, who is also a personal creditor of the executor, are held to have been properly applied, at the discretion of the creditor, to the liquidation of the personal debt.

The debtor has the right at the time he makes a payment to appropriate it to whichever of several demands held against him by the creditor he pleases; if he fail to exercise this right then the creditor can appropriate the payment. Crisler *v.* McCoy, 33 Miss. 445.

If a party be indebted by mortgage and also by simple contract debts to the same creditor, and make a payment and omit to apply it specifically to one of the debts, the law will make the application in the way most beneficial to the debtor, viz.: to the mortgage. And so if the mortgagor sell the mortgaged property, and the purchaser pay the purchase money to the mortgagee, who has another debt against the mortgagor, the law will apply the payments made by the purchaser in exoneration of the mortgaged property. Poindexter *v.* LaRoche, 7 S. & M. 699.

A debtor owing several demands may, when he makes a partial payment, apply it to that demand which he sees proper. If he do not make an appropriation of the payment then the creditor may; and if neither make it the law will make the appropriation. And this right of the debtor to make the appropriation is not lost when the creditor obtains possession of his money without his consent, otherwise than by a judicial proceeding which is binding on the debtor. And it was recognized fully in a case where the

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Statement of the Case.

A petition was filed by H. H. Pattison, a creditor of the estate of Jane E. C. Pattison, to subject certain real estate of decedent to the payment of two judgments which she holds against the estate. The testator died July 17, 1873, leaving a will, making her husband executor, requiring no bond. The sole heirs were D. S. Pattison, husband, and Elizabeth Montgomery and Lucy Jeffries, children. The will was duly probated and executor qualified, but no publication for claims against the estate was made. R. E. Richardson recovered judgment in a suit at law against D. S. Pattison, executor, for $300, and John Burnett recovered a judgment for $236, both at the May term of the court, 1877, and both judgments were duly assigned to petitioner. On December 5, 1877, a payment was made of $108, and on December 12, 1883, $116.44 was paid on said judgments. The real estate sought to be subjected by petitioner was admitted not to have been covered in the will of testator. Defendants claim two additional credits on these judgments, one for five bales of cotton, amounting to $219, and one for seven bales of cotton, amounting to $259.77, and claim full payment.

The evidence shows that the five bales of cotton were given to E. S. Drake, as attorney for R. E. Richardson, before the assignment by him to petitioner, and the cotton sold to one Kearney, who gave his draft on New Orleans for same. On the next day, said

creditor attached the debtor's money in the hands of his agent and forced the agent, in order to obtain a release of his own private funds from the same attachment, to agree that the money should be applied as the creditor desired. Dennis *v.* McLaurin & Co., 31 Miss. 606.

A party indebted on several accounts may, on making a payment, direct its appropriation. Champenois *v.* Fort, 45 Miss. 355.

In this State the rule of the civil law, which, in the absence of any appropriation by either debtor or creditor, appropriates payments most beneficially to the debtor, obtains. McLaughlin *v.* Green, 48 Miss. 175.

But the debtor owing several debts cannot invoke the principle that appropriation of payments are to be made in the manner most beneficial to him, if there is a course of business between him and his creditors from which an agreement will be implied that a different rule shall control. Gwin *v.* McLean, 62 Miss. 121.

The rule that a debtor making a voluntary payment may direct which of several debts the credit may be applied to, and if he gives no direction the creditor may make the application, and if both omit it the law will apply it, has no application where payment is enforced by process of law or *in invitum*. Wooten *v.* Buchanan, 49 Miss. 386.

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Kearney recalled the draft from Drake, on the ground that the cotton was mortgaged, and defendant Pattison was so informed. Later defendant D. S. Pattison shipped to New Orleans, La., for account of H. H. Pattison, plaintiff, seven bales of cotton, netting $259, but this sum was applied on a prior debt due plaintiff by said D. S. Pattison. Upon this showing the chancellor sustained the petition and appointed a commissioner to render an accounting, which, when returned, showed a balance of $506. From this decree and commissioners' report, defendants appeal.

APPEALED from Chancery Court, Claiborne county, LAUCH MCLAURIN, Chancellor.

Affirmed, May 25, 1885.

Attorney for appellants, S. Thrasher.

Attorney for appellee, J. D. Vertner.

Brief of S. Thrasher:

This is a petition filed by H. H. Pattison, a creditor of the estate of Jane E. C. Pattison, to subject certain real estate of the decedent for the payment of a couple of judgments which she holds against the estate. Code, § 2047.

The judgments were recovered at the May term, 1877, of the Circuit Court of Claiborne county against D. S. Pattison, executor of the estate; one in favor of R. E. Richardson for the sum of $300, at 6 per cent. interest, and the other in favor of John Burnet for the sum of $236, at 6 per cent. interest. Both these judgments were transferred and assigned to petitioner on January 1, 1878.

The first matter to which the attention of the court is called is the fact that the petition is unsworn and the answer is sworn to by E. R. Montgomery, one of the respondents. If we are to be governed by the rules that obtain in chancery, then all the matters in the answer responsive to the allegations in the petition are to be taken as true, unless they are controverted by one witness and strong corroborating circumstances, or by the testimony of two witnesses. Code, § 1949.

The theory of the defense in this case is that the judgments

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have been fully paid, by payments made both before and after the 1st of January, 1878, the date of the assignment to the petitioner, as follows, to wit: That on the 23d November, 1877, there was paid on the Richardson judgment and costs the sum of $219, and that in December, 1877, there was paid on the same judgment the sum of $108. (This last payment is admitted by the petitioner.) That in January, 1879, there was paid to the executor the sum of $259.77, and in the fall of 1883 there was paid the sum of $142.78 (petitioner admits that in the fall of 1883 the sum of $116.44). These payments the appellants insist have fully paid and discharged the said judgments.

Col. Pattison testifies that on the 23d of November, 1877, he, as executor, sent five bales of cotton in town, Port Gibson, to Sheriff Buck, to be sold by him and the proceeds credited by him on the execution issued on the Richardson judgment. He further testifies that he obtained from Mr. Drake, the attorney of Richardson, a receipt for the proceeds of the cotton, to wit, the sum of $219. * * * and afterward in December, he, as executor, made another payment of $100 on the execution, which at the time he understood satisfied the Richardson judgment.

He further testifies that the transaction between Mr. Drake and Capt. Kearney, the purchaser of the cotton, whereby Drake gave up to Kearney his draft for $192.75, the proceeds of the cotton less the costs of suit, to-wit, $26.35, and seventy-five cents charges for weighing the cotton, was done in his absence and without his consent and knowledge. * * *

Both the executor and the heirs-at-law, who are sued herein, have an interest in having the proceeds of these five bales of cotton applied in payment of the debts of the estate, and neither they nor the executor were parties to this arrangement between Mr. Drake and Capt. Kearney. * * * Now these judgments were assigned to petitioner on January 1, 1878 after these payments were made, and if the petitioner suffers a loss it is her own fault, for both Pattison and E. R. Montgomery swear that she purchased them without their knowledge or solicitation, and that they knew nothing of the purchase until long afterward. * * *

It is claimed by the petitioner that D. S. Pattison owed her individually for assistance advanced him early in the year 1878, for his defense on a charge of homicide; this indebtedness, how-

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ever, is emphatically denied both by the executor, Pattison, and his daughter. The proof shows that Pattison paid the petitioner the sum of $259.77 in January, 1879, and petitioner claims that the law ought to appropriate this money to what she claims as an individual indebtedness. All the circumstances go to show that Pattison appropriated this payment to the balance due on the judgment, though there is no proof that he directly informed the petitioner or her husband that he so applied it at the time it was made. The debtor has the undoubted right to appropriate at the time he makes the payment, and this fact can be shown by circumstances, and it need not be expressly declared by the debtor. Munger on the Applications of Payment, 24, 25, and authorities there cited under Rule 2.

Now the circumstances which are to show the fact of the appropriation by Pattison are, that he got this seven bales of cotton from one of the heirs to pay this judgment, and the fact that his daughter, one of the heirs-at-law, turned him over the cotton expressly to pay the judgments. The fact that he shipped the cotton as an executor, and the fact that he regarded the judgment as a lien on the land, and the further fact that he denies that he owed petitioner anything individually, etc., all these facts go to show what Pattison intended should be paid. * * *

Pattison being ignorant that petitioner claimed anything from him, individually, and knowing that he did not owe her anything, had no opportunity to appropriate the payment, but as he testifies, considering that he only owed the one debt, and that on the judgments, he shipped the seven bales of cotton for account of them. Hence, not knowing of any individual indebtedness claimed by the petitioner, he had no opportunity to make an application, and this he must have before he, or the court can appropriate. In this case it is not contended that the creditor made any appropriation of the payment. In this State we follow the rules of the civil law in regard to the appropriation of the payments, and the creditor cannot appropriate where one of the debts is controverted or disputed. Munger on Application of Payments, 5, 6; Art. 2, Text of the Civil Law.

An application by the creditor is not complete until the fact is communicated the debtor. Sawyer *v.* Tappan, 14 N. H. 352.

In this case the heirs are necessarily made parties, and they are in some sense sureties for the real estate which has descended to

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them from the decedent, and which now belongs to them, and are responsible for the payment of the judgments; hence, according to the rules of the civil law, the law will appropriate the payment to the judgment. This is not only the rule of the civil law, but in a great many of the American cases, where the judges were disposed to follow the rules of the common law, they have applied the benefit in behalf of sureties and those who were bound for the debt. Stone *v.* Weymour, 15 Wend. 19.

The above case from Wendell is one where the court applied payments for the benefit of sureties.

The courts lay down the doctrine that in the absence of an appropriation by either of the parties, the law will apply it according to the equity and justice of the case. Poindexter *v.* LaRoche, 7 S. & M. 699. * * *

Every case stands on its own peculiar, particular, and exclusive equities. From the whole tenor of petitioner's evidence, she seemed to look to these heirs for payment of the judgment; hence she was bound, according to her own statement, to so appropriate the payment as to injure them the least possible, and what she was compelled to do the law will certainly do. * * *

In the case of Poindexter *v.* LaRoche, 7 S. & M. 699, the court uses this language: "When A. is indebted in bond and in judgment and sells his land, and the purchaser pays a sum of money to the creditor without application, the law will apply it to the judgment in exoneration of the land, page 713." Gwin et ux. *v.* Whittaker's Admx., 1 Harr. & J. 754.

To allow a decree of the court below to stand, and subject the real estate of the decedent now descended to these heirs-at-law for the payment of these judgments, would in the matter of the five bales of cotton in November 23, 1877, in effect compel these heirs to pay the private debt which the executor owed Capt. Kearney, and this, too, out of the assets of the estate; and, as I have said before, the court would be forcing the executor to commit a *devastavit.*

To refuse to appropriate the proceeds of the seven bales of cotton furnished by one of the heirs for the express purpose of paying on the judgments, would be to compel the heirs-at-law to pay the individual debt of their father. The law makes the application and will do it according to the dictates of justice. * * *

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Brief of J. D. Vertner:

The only errors assigned which we deem it necessary to notice are the first and second, by which the appellants seek to charge appellee with $192.75 + $259.77 = $452.52. If these errors could be sustained, the account on these judgments would appear as follows:

Two judgments rendered May term, 1877, aggregating $536.50, at 6 per cent. interest.

Payments thereon as follows:

November 23, 1877, $192.75; December 5, 1877, $108; January, 1879, $259.77; December 12, 1883, $116.44.

From which would result (by calculation of interest) that on December 12, 1883, when the last payment of $116.44 was made, *every dollar had been paid;* and yet $116.44 more than was due (according to appellants) was paid, *with a promise of making further payments* as soon as more cotton was on hand.

The fact is that D. S. Pattison owed the appellee two debts, one consisting of these judgments against him as executor, and the other consisting of moneys advanced him individually in 1878, to aid him in defending himself upon a charge of homicide.

The appellee had purchased the said judgments in January, 1878, so as to give time for their payment; and she was induced to their purchase (at par) not as a speculation, for they carried but 6 per cent. interest, but simply, as she testifies, out of consideration for her nieces, the daughters of D. S. Pattison. Prior to assignment only $108 had been paid on these judgments, and no payment was demanded on them until several years after their assignment, and the only payment then made was $116.44 in December, 1883, about five years after assignment. * * *

As to the claim of $192.75, as a credit on the judgment of Richardson, it appears that an execution was in hands of sheriff in November, 1877, upon which no levy or action was had. D. S. Pattison had five bales of cotton sold in Port Gibson in November, 1877, at private sale, which was bought by Capt. Kearney, merchant, who paid to E. S. Drake, attorney for Richardson, $26.35 in cash and gave his draft for balance of purchase money, $192.75. Mr. Drake, as he testifies, paid to the sheriff the costs, $26.35, and indorsed on the execution a receipt for $192.75 as in part of plaintiff's money. Subsequently, upon rumor of a mortgage upon the cotton, Capt. Kearney (who was the merchant

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of D. S. Pattison) demanded back his draft, or had it held, and Mr. Drake had the sheriff to erase *in red ink* his receipt for purchase money. * * *

In reply to the suggestion that these five bales of cotton were a payment for two estate mules — sold by Pattison as executor — we reply: First. That since the judgment creditor never received one dollar of the proceeds of this cotton, it is difficult to perceive the force of the suggestion; and second, that the answer of appellees avers that Pattison's testatrix left no personal property whatever, "except some household furniture and a carriage."

In answer to the second assignment of errors the court below held that the $259.77 was a payment on the individual debt of D. S. Pattison to the appellee and not on these judgments. Appellants deny any individual debt of D. S. Pattison to appellee, and argue that, even if any such were due, this sum of $259.77 should be applied by the court to the judgments. And thus arise the only two questions of any interest therein.

First. Did D. S. Pattison owe appellee any such individual debt? and second, If he did, how should the court apply this payment? * * *

When Pattison was being prosecuted for homicide it became necessary to employ further counsel in his defense; after agreeing upon an attorney and the fee, he (D. S. Pattison), then confined to jail, asked a friend to see the husband of appellee and get him to arrange as to the fee: D. S. Pattison says that he knew his brother (appellee's husband) "was bankrupt" and "didn't own a dollar." It is not denied that his brother, acting under his (D. S. P.'s) request, arranged the fee of Judge Cassedy, paying him by appellee's draft on funds of her own $250, and D. S. Pattison admits that he got and used two of her drafts in his favor for $30 and $15, making $295 advanced early in 1878 for his account.

* * * We submit that the seven bales of cotton from which this money came were shipped in response to the letters of appellee's husband, one of which was to D. S. Pattison and two to his daughter, all referring to this individual debt, and the one which appellee says was written to D. S. Pattison requested him to provide to pay this debt for moneys advanced by her. * * *

But even admittting, *arguendo,* that there is no indication in the evidence as to how this payment was intended, still we submit

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that, under the established rule of law in such cases, the court did not err in appropriating it to the individual debt, rather than to the debt on these judgments, due by him in his representative character as executor. Sawyer *v.* Tappan, 12 N. H. 357; Fowke *v.* Bowie, 4 Harr. & J. 366.

In Fowke *v.* Bowie, the instruction upon which a reversal was had was not condemned because it announced that where a debtor owed debts individually and representatively, the court in the absence of appropriation by the parties will apply it to the individual obligation; but the instruction was held vicious because it denied the right of the debtor to apply a payment to the representative in preference to the individual debt, if he so elected. 4 Minor Rule; Munger on Payments, 142–148; 1 S. & M. Ch. 331.

It will not be denied that D. S. Pattison could (in case he had not at the time of this payment applied it, and in case no application had been made by appellee or her husband for her) now invoke the court to have the payment in question appropriated to his individual debt. The court would not, however, so apply it, because he *now* might so request; for the court listens to neither party where there has been no appropriation at the time of payment. The court decides upon established rules. * * *

OPINION.—PER CURIAM:

We concede the correctness of the rules of law contended for by the learned counsel for the appellants as applicable to the appropriation of payments, but still think the chancellor correctly held that the land should be sold to pay the claims of the appellee. It would be most unjust to make the proceeds of the five bales of cotton spoken of a credit on the debt due to the appellee; and the proceeds of the seven bales of cotton sent to New Orleans by the appellant, D. S. Pattison, were properly held to have been devoted to the individual indebtedness of D. S. Pattison to the appellee.

Affirmed.

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Statement of the Case.

C. B. JOOR v. W. A. ELDER.

Landlord and Tenant — Abandonment — Unpaid Rent.

If a landlord covenants to put improvements on the leased premises and fails to do so the lessee has a right to abandon the lease at once, but is chargeable with rent for the time he has actually occupied the premises not paid for.[1]

Appellant, Mrs. C. B. Joor, made affidavit for attachment for rent due and to become due, and the writ was levied on property belonging to appellee, W. A. Elder, her tenant. Elder replevied the property and filed his declaration. Appellant filed her avowry and appellee filed a replication alleging that there was no rent due or to become due.

On the trial Mrs. C. B. Joor, appellant, testified that she leased certain lands to appellee on the 20th day of February, 1885, executing a written lease. The lease contained the following stipula-

1

Section 2498, Code 1892, wherein it is provided that "a tenant shall not be bound to pay rent for buildings after their destruction by fire, or otherwise, without neglect or fault on his part, unless he has expressly stipulated to be so bound," applies to rural as well as urban premises, and where the rental value of a farm materially depends upon the use of a ginhouse thereon, its accidental loss by fire entitles the tenant not to damages, but to an abatement of the annual rent during his term, the abatement to be in such proportion as the value of the use of the ginhouse and meachinery bears to the value of the use of the whole premises. Taylor *v.* Hart, 73 Miss. 22, 18 So. 546.

While the breach of a contract to repair may not be the subject of set-off in an action for rent, damages from such breach may be availed of by way of recoupment. Fowler *v.* Payne, 49 Miss. 32.

Where a landlord covenants to repair and the lease is to commence in the future the performance of the covenant becomes a condition precedent, and if the premises are not repaired at the time when the term should begin the tenant is discharged. Kiernan *v.* Germain, 61 Miss. 498.

But upon such breach the tenant, if in possession, must promptly avail of the right to abandon the premises. If thereafter he goes into possession, or being in, remains in possession under the lease any length of time he waives the condition and must pay the rent. The extent of his right in that event is to recoup against the rent the depreciation of the value of the term because of the breach. Kiernan *v.* Germain, 61 Miss. 498.

The execution of a lease does not imply a covenant that the lessor will make repairs. Nor is there any implied covenant on his part that the premises are suitable for the lessee's business. It is for the tenant to protect himself by proper covenants. Jones *v.* Millsaps, 71 Miss. 10, 14 So. 440.

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tions, to wit: "C. B. Joor, party of the first part, leases to W. A. Elder said land for $10 per month, payable monthly, said lease to commence on the 15th day of March, 1885, and end on the 31st day of December, 1886; the party of the first part agrees to have a bored well built on or before the 1st day of April, 1885, the said Elder agrees to advance the money to build same, the money to be taken out of rent." She further testified that she was the owner of the land leased and that Elder went into possession at the time named in the lease and she had a well built but it was not completed until about the 20th of April, 1885, and Elder paid for same out of rent; that on the 14th day of August, 1885, she went out to the premises and found that Elder was moving away with all his effects, when she sued out the writ of distress for rent; that at that time Elder owed two months' rent in arrears, amounting to $20, which added to the amount to become due up to the expiration of the lease amounted to $186; that Elder had before that time complained of the water in the well.

Appellee, Elder, testified that he leased the land from appellant with the understanding that the well be built, and that lease was to begin on March 15, 1885, and end December 31, 1886; that when the well was being bored he was informed that it could not be completed by the 1st of April, and he agreed to accept the lease if the well was bored by the time he moved on the place; that afterward he complained that the water in the well was not suitable to be used and was told that it would soon improve, but it did not improve and was never fit for stock to drink; that he had advanced May and June rents and when he was asked for rent on the 15th of July he refused to pay because the contract to have water had not been complied with; that Joor then agreed that if the water did not become fit for use in a month he would put good cypress curbing in the well; that the month passed and the water in the well could not be used by himself and family in any way, and no attention having been paid to it as agreed he abandoned the premises on the 14th day of August, 1885.

From a verdict and judgment for Elder, Mrs. Joor appealed.

APPEALED from Circuit Court, Wilkinson county, J. B. CHRISMAN, Judge.

Reversed and remanded, March 1, 1886.

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Points of Counsel.

Attorneys for appellant, T. V. Noland and J. H. Jones.

Attorney for appellee, D. C. Bramlett.

Brief of T. V. Noland, J. H. Jones:

We submit that the first assignment of error is well taken. This was a proceeding under section 1304 of the Code of 1880. There is no denial of the fact that Elder was moving his property from the premises; and that Mrs. Joor had a right to attach follows of course unless some good defense is interposed.

The defense set up is simply a breach of contract in not being furnished with water as stipulated in the contract. On this point the preponderance of evidence is clearly with appellant; appellee pays rent for three months and remains on the premises for two months after he refuses to pay more, on account of alleged bad water. * * *

As to Elder's testimony it is in the main corroborative of testimony for appellant. * * *

We submit then that the weight of evidence is clearly against the fact relied on by appellee to avoid payment of his rent, and to warrant him in abandoning his contract, namely that no well had been bored as required by it.

We submit further that the conduct of Elder throughout as shown by all the testimony, his own included, is clearly suggestive of bad faith. The fact that he remained on the leased premises for nearly five months, two months after well was bored and two months after refusing to pay any rent, is utterly at variance with the defense set up, that the water tasted of the new curbing and was unfit for use. * * *

If Elder really had any just grounds to abandon his contract, which is not proven, he had waived it by his continued occupation after such cause had existed. It seems to us clear then that Elder abandoned his contract without just cause and was clearly bound for the rent for the remainder of the term, that is, to the 31st of December, 1885.

If the court, however, should hold that the contract should be considered either entire or divisible, then there can be no question at all that two months' rent was due, and the jury should have so found. Elder himself admits this by his conduct in paying rent for two months after the well was bored, and by occupying the

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place two months after he got *tired* of paying for it. It is only necessary to suggest this point for consideration of the court, and we cite in support of it, Story on Contracts, p. 28, § 32; Sawyer *v.* Chicago, etc., R. Co., 22 Wis. 403; Orr *v.* Ward, 73 Ill. 318.

The second assignment of error, that the jury disregarded the instructions given for appellant in the Circuit Court, is certainly well taken. The instruction given for Mrs. Joor says that if Elder waived the construction of the well on April 1st, and if the water was only temporarily unfit for use, then there was no breach of contract and Mrs. Joor should recover. The first point raised is not controverted. Elder admits that he waived this provision of the contract. * * *

Brief of D. C. Bramlett:

A simple question of fact is involved here, upon which the jury has passed and their finding should not be disturbed. Appellant contracted to furnish, or rather to have a well bored on the leased premises before 15th March, 1885, meaning a well suitable for drinking purposes, etc. Failing to construct such a well, as the jury found, appellee was released from all liability. Kiernan *v.* Germain, 61 Miss. 498.

I submit that there is no error in the judgment of the court below, and it should be affirmed.

OPINION.—CAMPBELL, J., delivered the opinion of the court:

Upon the evidence of the appellee himself the appellant was entitled to a verdict. The appellee had been in possession two months beyond the time for which he paid rent, and had assented to and acquiesced in the proposal of Joor, on the 15th of July, to stay another month, and if by that time the well did not afford good water, the oak curbing would be removed, and other put in. Under this arrangement, a month should have expired, and if, after that, Joor with notice that the water had not improved sufficiently failed to comply with the obligation resting upon the lessor, the lessee might have left the premises, but even then it would have been a question how much was due for the occupancy not paid for.

Reversed and remanded.

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VICKSBURG & MERIDIAN RAILROAD CO. *v.* B. T. LIGON.

Damages — Excessive Verdict.

Damages to adjacent property caused by the direct result of a fire built by the employees of a Railroad Company on its right of way is held not to be excessive, when such damages as charged in the bill of complaint are impliedly, if not expressly, admitted to be true.[1]

Negligence — Master and Servant.

The employees of a Railroad Company, while at work on the right of way, built a fire by which to warm themselves for the better handling and accomplishing the work for their employer, this being their uniform practice on cold days. They were under the supervision of a section boss of the company. Not having carefully guarded the fires it spread and caused considerable damage to adjacent property. *Held* to be gross negligence of the employees, and the Railroad Company liable therefor.[2]

1

The high court will not disturb a verdict for damages in an action *ex delicto*, where it is not apparent that the jury misapplied the law, nor misunderstood the facts, nor had been influenced by their prejudices or passions. N. O., J. & G. N. R. Co. *v.* Statham, 42 Miss. 608; N. O., J. & G. N. R. Co. *v.* Hurst, 36 Miss. 660.

In actions sounding in damages, where the law furnishes no legal rule of measurement, save the discretion of the jury upon the evidence before them, the courts will not disturb the verdict upon the ground of excessive damages, unless it be so flagrantly improper as to evince passion, prejudice, or corruption in the jury. N. O., J. & G. N. R. Co. *v.* Hurst, 36 Miss. 660; M. & C. R. Co. *v.* Whitfield, 44 Miss. 466.

And the rule is the same, where the jury are by law authorized to assess a fine. State *v.* Blennerhassett, Walk. 7.

This court will not trench upon the exclusive province of the jury as to the *quantum* of damages, but where the record shows that the jury proceeded upon wrong premises, and the court below contributed to the error, and that the verdict was the result of haste, inconsiderateness, or intemperance a new trial will be granted. Myers *v.* Farrell, 47 Miss. 281.

Where the law furnishes no rule of measurement the court will not disturb a verdict as excessive, unless it be shown to be so flagrantly improper as to evince passion, prejudice, partiality, or corruption. Where different minds might, and probably would, arrive at different results as to the damages, and nothing inconsistent with an honest exercise of judgment appears the verdict will not be disturbed. Railroad Co. *v.* Caruth, 51 Miss. 77.

A judgment on a verdict in excess of the damages proved will be affirmed by the Supreme Court only on condition of appellees remitting the excess. Wagner *v.* Ellis, 85 Miss. 422, 37 So. 959.

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Statement of the Case.

This was a suit against the Railroad Company for damages to property along the right of way of said railroad, caused by negligence of its employees. The employees of the road (section hands) were engaged in repairing the roadbed and laying of rails, and were working under a foreman or boss. A fire was built out of the old cross-ties by them on the railroad right of way, to warm by, as was the usual habit in cold weather, but the fire was not carefully attended to, and spread to the adjoining land of plaintiff, destroying a large number of panels of plank fencing, house, etc., amounting to $550, all of which was proven on the trial. Evidence showed that the employees made no attempt to put out the fire they had built up, when they stopped work that day, but went away leaving it burning.

A judgment was rendered against defendant company for $550, from which they appeal.

APPEALED from Circuit Court, Hinds county, first district, T. J. WHARTON, Judge.

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The negligent use of fire renders the party so using it liable for damages resulting to others therefrom, and in an action therefor, while the burden of proof is on the plaintiff to show negligence, this burden is met when it appears that the fire was kindled at a time and place when it was likely to spread or to pass beyond control, or that it was afterward left without proper care. In such case, negligence is *prima facie* established independently of section 1059, Code 1880. So held in this case, where the burning of plaintiff's property resulted from the act of an employee on a moving train of defendant in throwing from the locomotive a burning piece of wood, which fell on ground thickly covered with grass. Railroad Co. *v.* Gray, 62 Miss. 383.

Section 1054, Code 1880, declaring that railroads shall be liable for damages resulting from the negligence or mismanagement of their agents, engineers, or clerks is substantially an affirmance of the common law on that subject. Railroad Co. *v.* Gray, 62 Miss. 383.

A railroad company, which sets out a fire on its right of way so near buildings as to endanger them, is negligent if it fail to guard the fire for the entire time such danger exists. Brister *v.* Illinois, etc., R. Co., 84 Miss. 33, 38 So. 678.

Evidence that defendant's employees set out a fire on a windy day on defendant's right of way, which was covered with dry grass and adjoined plaintiff's premises on which there was also dry grass, supports a finding of negligence. M. & O. R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 14.

The owner of a grove injured by a fire negligently set on the adjoining right of way of a railroad by the section men is not guilty of contributory negligence because he failed to keep the grove free from grass. M. & O. R. Co. *v.* Stinson, 74 Miss. 453, 21 So. 522.

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Affirmed, May 26, 1884.

Attorneys for appellant, Nugent & McWillie.

Attorney for appellee, Frank Johnston.

Brief of Nugent & McWillie:

This is a singular case. The point is to hold a Railroad Company to liability for damages done by fire to the farm and fencing of appellee for the reason that the fire was kindled on the right of way by *laborers* upon the track of the Railway Company, and was communicated thence to appellee's meadow, and could have been put out readily by such laborers. * * *

The grounds of the action are stated to be these:

Mrs. Ligon owned a large place adjacent and next to the defendant's roadway and track.

As a necessary means of operating its railroad the company employed a large number of hands called section hands, who, on the day named, were engaged in repairing the track under the control and supervision of an agent and employee of defendant, known as a section-master, "who has general supervision of a large section of defendant's roadway and track, and who has the control, direction, and management of all the section hands assigned to his section, and who had, on the occasion stated, the control, management, and supervision of the large party engaged" in repairing the track opposite appellee's farm.

The weather was cold and temperature freezing, and the road-working party, having to use iron crowbars, built a large fire of old cross-ties on defendant's railroad track to "warm themselves and the better to perform the labor required of them," and so negligently and carelessly managed said fire that the same was communicated to the sedge grass on plaintiff's land, which burned and spread rapidly and consumed a great quantity of fencing.

That said fire was built by the direction or consent and approval of the section-master "in connection with and in furtherance of the work of repairing the track," using for that purpose old cross-ties left by appellant on the road for the purpose of being burned.

The section hands were in the habit of burning said old cross-ties "not only for their necessary comfort in cold weather, but as

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a means of getting rid of the useless and abandoned cross-ties," and this was well known to appellant, and reasonably within its contemplation of appellant, "in view of the character of work in cold weather required by the section boss."

The section boss was a general agent of appellant entrusted with the charge and supervision of an entire section of the roadway and having full control and direction of the hands.

The employees are personally insolvent and cannot be made by law to respond in damages to the injury done the plaintiff. * * *

The effort is to subject the company to liability because of the fire built by laborers on its roadway. The rules governing this class of cases are well known and have been clearly settled thus: The true test by which to determine the liability of the master or employer for the negligent or wrongful acts of the servant or employee * * * is, was the wrongful or negligent act done in the course and scope of the employment of the servant or agent? If it was the employer is liable. But if the employee does any act *out of his employment,* as committing an assault with his own hands upon a stranger, and independent of his employment, the employer is not liable. Johnson *v.* Chicago R. Co., 8 Am. & Eng. R. Cases, 209. See 23 Pick. 24.

An employer is liable for the torts of an employee *only* when they are committed in the course of his employment. The difficulty has been to determine what act should be deemed within the course of his employment. * * * The rule is that an employer is not liable for a willful injury done by an employee, though done while in the course of his employment, unless the employee's purpose was to serve his employer by the willful act. Where the employee is acting in the course of his employment, the employer is not liable, even for the employee's negligence, and the mere purpose of the employee to serve his employer has no tendency to bring his act within the course of his employment. When a female servant, having authority to light fires in a house, but not to clean the chimneys, lighted a fire for the sole purpose of cleaning the chimney, it was held that her employer was not liable for an injury caused by her negligence in lighting the fire. Marion *v.* Chicago R. Co., 8 Am. & Eng. R. Cases, 179; 1 Am. & Eng. R. Cases, note p. 466; 2 Kent's Commentaries, 259; 48 Miss. 112; 26 Miss. 487.

It cannot be said, and the declaration does not allege, that the

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fire was *kindled* in the course of the servant's employment. It is not suggested that the particular injury or act or trespass of the employee was done by the command of the employer or with his assent. The laborers were merely *menial* servants. The tort of the laborers, if any, consisted not in building the fire and *warming themselves at it,* but in not taking care to prevent its being communicated to the grass around and near it. * * *

It is clear, however, taking the declaration most strongly against the pleader, that the kindling of the fire was wholly outside of the servant's employment and was made to effect an *independent purpose of their own,* and not to execute the orders of the company.

* * * If the servant, *wholly for a purpose of his own,* disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another not within the scope of his employment, the master is not liable. But if the act be done in the execution of the authority given him by his master, and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done be occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner. Howe *v.* Newmarch, 12 Allen, 56, 57.

In Turberville *v.* Stamps, 1 Ld. Raym. 264, Lord Holt says: "If the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet his master shall be liable to an action for damage done to another by the fire, for it shall be intended that the servant had authority for his master, it being for his master's benefit." So in Tilater *v.* Phippard, 63 Eng. C. L. 346, a fire was knowingly lighted by a man's servant in his master's close, and permitted to extend, by negligence, to the close of a neighbor, and the master was held to be bound. In both these the fires were kindled in the way of husbandry, that is, the stubble was being burned by the master's command. Here the fire was not necessary or in the scope of the employment of the servant, and was not ordered. * * *

Brief of Frank Johnston:

There is no new question of law presented by this case. The case turns on the application of the doctrine of the liability of a

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master or employer for the acts of negligence of his servants committed in the prosecution of the business of the master.

There can be no controversy about a single material fact in the case. On a cold wintry day, the ground frozen, a squad of section hands under the command of a section-master, or "boss," engaged in repairing the appellant's road, built a fire, as was their custom, to warm themselves by in the progress of their work. The fire was built on the roadway, or right of way, six or eight feet from the rails, on the north side of the track; the roadway on each side was covered with a growth of heavy bermuda grass, and sparse sedge grass. This caught from the fire built by the section men, and communicated with the grass on the plaintiff's land and burned her barn and houses and fencing, as stated by the witnesses.

The section men and their boss were in plain view of the fire as it crept to the plaintiff's land. Indeed, two or three of them were warming themselves by the fire built of cross-ties while the grass was burning and spreading to the adjoining land. It would have been an easy thing to have extinguished it, as explained by Mr. Ligon, and it was gross carelessness not to have done so. I will add that it is shown by the evidence that it was the habit or custom of the section men to use fire in winter time, and it has also been testified that the fire contributed greatly to their comfort and enabled them to better perform their work. These are, briefly stated, the material facts. * * *

It is proven that the grass caught fire from the cross-tie fire. While Mr. Ligon did not know it from having seen it catch, yet he traced the blackened and burned pathway up to the very coals of the cross-tie fire and nowhere else, and thus demonstrated its starting point. * * *

The case only calls for a correct application of the legal principle of the master's liability for the negligence of his servant.

Thompson says the master is liable for the acts of his servant "while acting about his business," resting on the principle that every one must so conduct and manage his business so as not to injure others. Thompson on Negligence, p. 884, § 1. * * *

In Howe *v.* Newmarch, 12 Allen 49-57, cited by Judge Cooley, Hoar, justice, said: "If the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another

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not within the scope of his employment, the master is not liable." Cooley, p. 537.

Thus the rule is guardedly and carefully expressed. And so also in section 2, p. 535.

But in the case at bar, the fire for the section men, according to the proof, was not only necessary for their comfort, but it enabled them the better to perform their work for the company.

Moreover, it was their custom and habit to have a fire in cold weather. I may add that no section hands, where fuel is available, would be without a fire in freezing weather. They handle iron tools and iron rails, and a fire, if not absolutely indispensible, certainly would greatly aid them in their work.

Again, their having a fire was certainly within the contemplation of the company. The latter must have known of the habit and custom of the track repairers and section men in this respect, and suffered or permitted it.

The general roadmaster passed this squad of hands *twice* that day, and saw their fire and never thought of objecting to it. * * *

But, logically, the contention of the appellant comes to this, that it did not employ the section men to build a fire, but to repair the track, and, therefore, the company is not liable. It made a *prima facie* case that the Railroad Company knew and permitted it, to show the habit and custom of these employees in that respect. * * *

OPINION.— CHAMBERS, J., delivered the opinion of the court:

It is impliedly, if not expressly admitted that the amount of damages found is not excessive, that it was the direct result of the fire which sprung from the negligence and want of care of the railroad hands by whom it was kindled, but it is insisted that the facts did not warrant the application of *respondeat superior,* since in building the fire the hands acted for their own comfort, and not for that of the superior, or while properly conducting his business.

We rest our conclusion wholly on the following facts testified to by two witnesses: The weather was quite cold, and the hands under the control of a section boss were handling iron tools, and obliged to do so in order to execute their master's business. In doing this their uniform practice was to kindle fires in order

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thereby the better to do that business. They of course availed themselves of these fires for warming their own persons, but this was immaterial if such warning was necessary to and promotive of the work which they were employed to do. They had never been seen doing such work without these fires. Their orders were, so one of their own number proves, always to carefully guard the fires. They on the contrary were guilty in the present case of gross negligence in reference to them.

We cannot say the jurors erred in holding their superiors liable.

Affirmed.

THOMAS HARWOOD et al. *v.* H. M. & R. J. COLSON.

Administrator — Chargeable with Interest on Moneys Collected — Claims Due Him as Offset.

An administrator is not chargeable with interest on moneys collected for the estate, where it is shown that claims due to him as an individual will more than offset such interest.

Same — Collusion and Fraud.

A mere discrepancy in account between an administrator and his broker, through whom all moneys of the estate were handled, where his final account rendered shows the proper receipt and application of moneys received by him, will not support a charge of collusion and fraud between the parties.

C. L. Barrett was a creditor of Benj. Harwood, who died intestate, and as such creditor filed a petition in the Chancery Court of Claiborne county to be appointed administrator of the estate of deceased, which consisted of a claim against the United States government for cotton taken during the Civil War. Letters of administration were issued, and the administrator, upon the execution of a proper bond, was duly qualified. His account as rendered showed receipt, on October 5, 1875, of $6,462.76, less ⅜ per cent. exchange, $24.23, leaving a net amount received, $6,438.53. Various small claims were paid out of same, amounting to $873.80, which also included court costs, 5 per cent. administration fee; all of which claims were duly probated and allowed. There were also probated and allowed two claims, amounting to $445, as attor-

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ney fees for defending suits against the estate. A judgment in favor of William McD. Sims was recovered against the estate, amounting to $4,659.97, which was compromised by the administrator upon payment of $3,500 in full settlement. The administrator held a note against the estate executed by deceased July 5, 1869, which, with interest up to date of rendering of first account, amounted to $1,287.56. The administrator also held a decree rendered in the Chancery Court February 27, 1873, of a balance due of $828.68, and interest of $208.10, making a total of $1,036.78. There was paid on these claims of the administrator $1,647, as shown in the final account. Exceptions were filed by Thomas Harwood et al. to the said final account in that the money received for the estate was deposited with J. Burbett & Co., New Orleans, La., and no interest was paid thereon, nor was said money loaned out to the best interest of the heirs, and that by reason thereof the said heirs were defrauded, and that the said administrator did falsely apply payments to his personal account. The exhibits to the testimony offered showed the statement of account of the administrator upon which no interest was credited, and the payments were not in the sums in like amounts as shown by said final account. This exhibit also showed other moneys received and paid out by said administrator, his personal account being mixed with that of C. L. Barrett, administrator. The total amount of claims probated against the estate amounted to $7,250, principal, and interest aggregating $1,250. One of said claims, amounting to $1,306, was disallowed, being barred by the Statute of Limitations. Shortly after the rendering of the final account C. L. Barrett died, and appellees were appointed administrators, and the action revived against them. The exceptions having been overruled, complainants appeal.

APPEALED from Chancery Court of Claiborne county, RALPH NORTH, Chancellor.

Affirmed, June 9, 1884.

Attorney for appellants, J. McC. Martin.

Attorney for appellee, E. S. Drake.

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Brief of J. McC. Martin:

* * * Questions involved in this appeal may be briefly considered under two heads, to wit: 1. Should the pretended final account of the administrator, in view of the evidence, be allowed? 2. Is said administrator chargeable with compound interest on the money of said estate received by him? If so, from what date, and at what rate of per cent.? * * *

The rules which fix an administrator's liability for interest on the money and funds of the estate, as applicable to this case, are five in number, to wit: illegal disbursement; removing and lending funds of estate; improperly withholding, and not accounting for receipts; using the money of the estate for his own purpose; and mingling the funds of the estate with his own.

"If the administrator makes illegal disbursements, or if he lends the notes, or bonds of the estate, he is liable for interest." Carson *v.* Carson, 31 Miss. 596; Crowder *v.* Shackleford, 35 Miss. 360.

C. L. Barrett paid, October 19, 1875, discount on Riggs check, without authority of law, nor does he exhibit a voucher. He also pays L. Unger, September 6, 1875, $2.50, which was illegal, and, lastly, he pays C. H. & C. L. Barrett's claims on note and decrees, without taking a receipt, and without proper proof of their claim under said decree. Besides he illegally sends the money of the estate to New Orleans, deposits it with Bennett & Co., who mingled the same with their own funds, in Canal Bank, and draw against it in the general course of their business. This is in effect a loan to said firm, though not so intended.

If the administrator fails to account for receipts or improperly retains same, or if he uses the money of the estate for his private purposes, he is chargeable with interest thereon, at the highest legal rate; for the trustee is not permitted to speculate and make a profit upon the funds in his hands; or if he mingles the funds of the estate with his own he is so liable. Carson *v.* Carson, 31 Miss. 596; Crowder *v.* Shackleford, 35 Miss. 360; Cole *v.* Leake, 5 Cush. 771; Anderson *v.* Gregg, 44 Miss. 182; Powell *v.* Cooper, 42 Miss. 221, 227; Satterwhite *v.* Littlefield, 13 S. & M. 306; Kerr *v.* Laird, 5 Cush. 550, 551. When a trustee uses a trust fund for his own benefit, and has made, or there is ground to infer that he has made, a profit, he is liable for compound interest. Troupe *v.* Rice, 55 Miss. 298. * * *

* * * "No administrator shall remove the property of the estate, of which he has charge, out of the limits of the estate,"

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etc. Rev. Code 1871, § 1186; Bridges et al., Exrs. *v* Maxwell, etc., 34 Miss. 314. Notwithstanding the statutory inhibition, the administrator does so remove the funds of the estate. He does so as early as October 19, 1875; then, within less than three months thereafter, he commences to use the money. In 1875 he uses $2,101.70, and, in less than five months, from said October 19th, he uses, in 1876, $2,851.50 more, making a total use, by him, within the twelve months from grant of letters, of $4,952.20. In the interim, and subsequent thereto, J. Bennett & Co. are using same. * * * Hence said administrator is chargeable with compound interest, on said money on said estate received by him, from October 19, 1875, and from the respective dates of the respective receipts, at the rate of 10 per cent., with annual rests, the disbursements being first credited on the interest due by the administrator at the time they were made, and the surplus, if any, on the principal. Carson *v.* Carson, 31 Miss. 595 *et seq.*

* * * A pretended claim of C. H. & C. L. Barrett is registered, in the aggregate, at $1,548.84, and although, as shown by Vertner's testimony, this had been previously paid out of funds withheld by C. L. Barrett, and although there is no legal proof that anything was due on the $828.28 claimed as balance on chancery decree, or that the same was ever paid to "C. H. & C. L. Barrett," yet, as of the date of the final account, he claims credit for $1,647 pretended to be paid on said claim. Thus said administrator uses $6,462.76 to pay registered claims, amounting to $5,454.04, embarks money of the estate in cotton future speculations, uses the same for his private purposes, withholds and conceals receipts, accounts for no interest, pays illegal claims, represents the estate to Drake and Vertner as insolvent, and then claims that he has judiciously administered the estate. The whole records show a fraudulent use of the funds of the estate and a fraudulent concealment of money belonging to the same, whereby said administrator, with no appraisement or inventory to show the assets of the estate, calculated on reaping large profits.

Brief of Lauch McLaurin:

* * * Since writing the above I find that counsel with whom I am associated in this case has prepared an elaborate brief, and I will confidently rely upon that as a full presentation of the case.

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Brief of E. S. Drake:

* * * C. L. Barrett, as a member of the firm of C. H. & C. L. Barrett, could receive any debt due the firm and bind the firm by receipt. He had an equal right to *retain* any debt due the firm. He did retain $1,647 of this debt due the firm of C. H. & C. L. Barrett, and his charging the estate of Harwood with it is tantamount to a receipt. But counsel says C. L. Barrett did not divide the $1,647 with C. H. Barrett. There is no evidence of this, but if it were true it would be a matter about which the heirs of C. H. Barrett alone could complain. So that this exception was properly overruled.

Was the administrator properly chargeable with interest on $6,432 received by him as the money of Harwood and with which he credits the estate in his accounts? We are unable to find any facts or circumstances in the record of this case which brings the above within the rule. The rule as laid down in Troup *v.* Rice is correct and is a summary of the law on that subject. If the administrator has used the funds of the estate in his private business and made a profit for himself, or if he has without cause unreasonably delayed a settlement of the estate, he is chargeable with interest. * * *

* * * *There is, in fact, not one iota of proof that Barrett ever got any money or property belonging to the Harwood estate,* except what he admits by his accounts he received. There is absolutely no other evidence *in the record* or elsewhere (except the imagination of counsel) to show that Barrett received any money of Harwood. * * *

* * * C. L. Barrett wrote J. Burbett & Co. of New Orleans a letter, enclosing them an exchange on New York for $6,462, and requesting them to credit him individually with the net proceeds thereof and to hold the same on special deposit subject to check, the account to be kept with him as administrator. Administrator of what or whom, witnesses did not know. Exhibit "J," page 73, shows that on October 19, 1875, J. Burbett & Co. credited "C. L. Barrett Administrator" with net proceeds of check of Riggs & Co., $6,432.53. * * *

* * * These are the facts and the only facts from which counsel *infer* (for there is no direct proof that he used the money) that Barrett used the money in his own business and for his own profit. The court below very properly refused to indulge in this

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very violent presumption. Other equally reasonable presumptions consistent with the honesty of the administrator might be indulged in. * * *

* * * We introduce ample testimony to show the good faith of the administrator and that the estate was wisely and judiciously managed. We show by testimony of Drake that he resisted the claims of McLean and Sims by advice of counsel. The record shows that the McLean suit was brought six or seven months after administrator first received funds; that it ripened into judgment in November, 1876; that Sims brought suit to that same term (November, 1876) and recovered judgment at following term (June, 1877); that an appeal was contemplated from this judgment, but abandoned when Sims compromised at $3,500.

* * * It is attempted here in this court for the first time to raise a third point, to wit: That the executor embezzled over $3,200 of the estate. I shall show in reply to this: 1. That there is no evidence whatever to show that he received any money of Harwood estate other than the $6,432.53 credited in his accounts. 2. Even if the record did disclose any evidence on this point, yet the *laches* of the appellants would prevent their taking advantage of it here. The record discloses no evidence from which this court can presume that Barrett ever received a dollar except the $6,432.53 with which he credits the estate. * * *

* * * If administrators are to be presumed embezzlers and perjurers on such testimony, who will undertake to administer an estate?

OPINION.— PER CURIAM:

After careful attention to the several grounds urged by counsel for the appellants for the reversal of the decree in this case, the only one which induced hesitation was the question of the liability of the administrator, Barrett, for interest on the money of the estate, and upon full consideration of that question our conclusion is that the decree should not be disturbed.

It is doubtful whether the administrator was chargeable with interest on any portion of the money, but, conceding that he was, a computation shows that the interest with which he might be charged falls short in amount of the sum due on his own claim, and which he failed to realize because of the insufficiency of the estate.

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Statement of the Case.

The complaint that he put the money out of this State, and that it was "mixed" with other funds in the Canal Bank, is without merit.

The ⅛-per cent. exchange was properly deducted from the Riggs & Co. check. The complaint of embezzlement is not supported by evidence. It has no semblance of foundation except the exhibit of the dealings of the administrator with J. Burbett & Co., and that is insufficient to maintain the charge.

Decree *affirmed.*

W. D. HOWZE *v.* THE STATE.

Criminal Law — Technical Violation of a Statute.

In the prosecution for a misdemeanor, although the evidence acquits the defendant of moral wrong or corrupt intent, if it shows a technical violation of a statute a conviction will be sustained.[1]

Appellant, Howze, was treasurer of De Soto county, his term expiring January 1, 1880. He turned over all the books and records of his office to his successor except a small account-book which he bought and paid for himself which contained various memoranda of accounts with the county and reports made by him as treasurer. The evidence showed that everything contained in this book was of record in the chancery clerk's office; that appellant regarded this book as his private property and not the property of the county. This book was demanded of him and he refused to give it up to his successor. He was indicted for failing to turn over the records of his office to his successor and convicted. The court gave the following instruction for the State, to which defendant excepted.

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Where an act, without reference to the intent, is made punishable the law will presume the intent from the doing of the act, and it is no defense that the accused acted in good faith, not intending a wrongful act. Knight *v.* State, 64 Miss. 802, 2 So. 252; King *v.* State, 66 Miss. 502, 6 So. 188.

Under this rule the good faith or honest belief of one indicted under section 2980, Code 1880, for going upon the enclosed land of another, after being notified not to do so, is held to be no defense. Knight *v.* State, 64 Miss. 802, 2 So. 252.

And so of a sale of a beverage that is intoxicating. King *v.* State, 66 Miss. 502, 6 So. 188.

And this is true of the statutory offense of carrying a concealed weapon. Strahan *v.* State, 68 Miss. 347, 8 So. 844.

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"If the defendant intentionally retained the records of his office from his successor in office before or after a legal demand was made upon him for them he is guilty as charged and the jury should so find."

Defendant was sentenced to pay a fine of $25 and costs and appeals.

Affirmed.

APPEALED from Circuit Court, De Soto county, A. T. ROANE, Judge.

Affirmed, March 17, 1884.

Attorneys for appellant, Fitzgerald & Whitfield.

Attorney for State, T. C. Catchings, Attorney-General.

Brief for appellant:

The error, as we think, in the judgment of the court below, and upon which we rely for a reversal, was the instruction of the court below at the request of the State, to-wit: "If the defendant intentionally retained the records of his office from his successor in office before or after a legal demand was made upon him for them he is guilty as charged and the jury should so find."

This was the only instruction given by the court in the last trial. No other was asked on either side.

This instruction was wrong and calculated to mislead the jury. If intentionally means willfully, in contemplation of the statute the instruction is correct; otherwise it is not correct. The jury understood by the instructions that if the defendant intended to retain the book, no matter what induced him to do so, he was guilty as charged. That was the only construction they could give it. It was equivalent to instructing them to find a verdict of guilty. If the defendant refused to give up the book, he of course intentionally retained it, and yet this court, when the case was here before, makes a distinction between a mere refusal and a willful refusal. This fact was urged upon the consideration of the court below, but without avail. 59 Miss. 233. By the ruling of the court the jury were given distinctly to understand that the words "intentionally" and "willfully" are synonymous for the purposes of this case. It

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is undoubtedly true that if the defendant intentionally retained from his successor what he regarded as the records of the office he was guilty. But the proof abundantly shows that the defendant did not regard the book as appertaining to the office of treasurer. He did not so receive it from his predecessor. He received it as the private memorandum-book of his predecessor. His predecessor certainly did not regard it as a book required by law, otherwise he would have charged the county with the money he paid for it. He received it as a gift from his predecessor and kept and regarded it as *he* had done, as a private memorandum-book. Had there been any entry relating to his office in the book which he could have had reason to conceal that fact might have outweighed everything said by defendant, but when it is considered that every entry relating to his office had been reported to the board of supervisors; that his reports had been recorded and the reports duly filed in the chancery clerk's office, the idea of a willful detention of the book is completely exploded.

* * * If defendant regarded the book as a record of his office, his intention to retain it would have been willful without doubt, but regarding it as his individual property excludes the idea of his regarding it as a record of the office and, therefore, relieves him of the imputation of willfully refusing to do his duty or of intentionally retaining the records of his office from his successor in office. * * *

The indictment is under the Code of 1880, § 2788, which makes the offense charged a felony or a misdemeanor at the discretion of the court. The indictment charged that a felony was committed and the verdict of the jury is "guilty as charged." The judgment of the court is, "that the defendant be fined the sum of $25." This court, when the case was before them at October term, 1881, say: "The indictment charges that the term of office of the defendant expired on the first Monday of January, 1880, and for this reason he could not be convicted of any offense created by the Code of 1880," etc., and yet as far as can be ascertained from the record, he was convicted of an offense created by the Code of 1880. The court further say, "but the indictment also included an offense under Code 1871, §§ 262, 2890." Under the Code of 1871, the offense was a misdemeanor. It is manifest from the indictment that the grand jury indicted defendant under the Code of 1880, and not under Code of 1871. The record of the proceedings shows that defendant was convicted under the Code of 1880.

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Brief for appellee:

If the book retained was a part of the records of the office, the fact that defendant may not have thought it was is no defense. It was his business to turn over the records to his successor, and he will not be heard to say that he did not know what the records were.

Moreover the word "intentionally" was manifestly used as synonymous with "willfully."

The question as to which Code the indictment was found under was settled when this case was here before.

PER CURIAM:

The appellant was convicted nominally of a felony but actually of a misdemeanor, for it is only by virtue of the law in force prior to the Code of 1880, and continued by it, that the indictment was sustained, and by that law the offense was a misdemeanor.

The evidence acquits the appellant of any moral wrong or corrupt intent. His withholding the book was a technical offense, as he should have delivered it to his successor, and intentionally and deliberately refused to do it. There was no error in the instructions of the court to the jury.

Judgment *affirmed.*

W. B. SHARPLEY v. B. T. REESE.

Sale of Manufactured Article — Special Warranty — Caveat Emptor, When Applied.

The manufacturer of goods who sells same is bound, without special warranty, to furnish an article reasonably sufficient for the purpose for which it is sold, but when the purchaser elects to take the article, after notice of defects and without warranty, the doctrine of *caveat emptor* applies.[1]

Suit by appellee, in the Circuit Court of Monroe county, against appellant to recover the sum of $100, the purchase price of a cotton

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No particular form of words is necessary to make a warranty of quality; any express affirmation as to the quality of the thing sold is sufficient. Kinley *v.* Fitzpatrick, 4 How. 59.

Any affirmation or representation in relation to the article sold, if it be intended to have the effect of a warranty, or if it be intended to induce the purchaser to rely on it in order to effect a sale, and he actually does rely on it, is sufficient to create a warranty, although the seller endeavored

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press sold him. From verdict and judgment for plaintiff defendant appeals.

Affirmed.

The opinion of the court states the facts.

APPEALED from Circuit Court, Monroe county, J. W. BUCHANAN, Judge.

Affirmed, February 4, 1884.

Attorneys for appellant, Houston & Reynolds.

Attorneys for appellee, Sykes & Bristow.

Brief for appellant:

* * * It will be noted that Reese made no objection to Sharpley taking the press away before the time agreed upon, and that he made no offer to have the repairs and alterations made. Reese warranted the press; that it would pack a bale with one mule. The press was tried by Sharpley and proved valueless. The defects were not alone those which were stated at the time the contract was entered into, but others, and mainly want of power. It was taken down, laid aside, and offered to be returned to Reese. * * *

If the taking of the press by Sharpley was tortious, and it could not be if he took it under the *bona fide* but erroneous belief that he had purchased it, his offer to return the property whence he had taken it and put it up and to pay $25 to $40, was a condonation of the taking, and he could not in an action of trover be made liable

by the use of the language he employed to guard against making a warranty. Otts *v.* Alderson, 10 S. & M. 476.

A manufacturer impliedly warrants that machinery built by him will answer the purpose for which it was constructed; and if it but imperfectly do so he cannot recover the purchase money. Brown *v.* Murphee, 31 Miss. 91.

As a general rule a purchaser of personal property buys at his own risk, unless the seller gives an express warranty, or the law implies one from the circumstances of the case, or unless the seller be guilty of a fraudulent representation or concealment in respect to a material inducement to the sale. Otts *v.* Alderson, 10 S. & M. 476; Simmons *v.* Cutreer, 12 S. & M. 584.

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for the value of the press. Witherspoon *v.* Blewett, 47 Miss. 570. * * *

If the press was valueless as a cotton press, and there was a warranty, express or implied, then there should have been no recovery of the amount of the price agreed to be paid. The warranty and breach of that warranty and offer to return the press was a defense to the action. If there was a wrongful taking and conversion of the property, and plaintiff had waived the tort and sued in assumpsit, he could not recover, because the tortfeasor, Sharpley, had not converted the property (the press) into money or other property, nor had he mingled it with his own, nor had he consumed it in his use nor changed its form. Evans *v.* Miller, 58 Miss. 125.

The court erred in the instructions given for the plaintiff. The first charge is to this effect: That if there was a contract between Reese, Ursery, and Sharpley, that Ursery was to construct a press like the one in controversy for $100 for Sharpley, that it was to be completed by a certain time, and if not so completed, that Sharpley was to have the press sued for in lieu of the one contracted for, and that Sharpley was told that the press would not suit him unless certain changes were made, which Reese agreed to make, and that Sharpley before the time stipulated for the completion of the press took the press sued for away and converted it to a beneficial use, without the consent and in the absence of Reese, and that Reese demanded pay for the press so carried away; this constitutes a waiver by both parties of the delay and of the repairs originally contracted for, and Sharpley is liable for the *price* of the press.

The taking of the press by Sharpley may have estopped him to deny that there was a sale, but did not waive any defense which he had under that contract of sale. He could still insist upon his warranty and a breach of that warranty as a defense to the action; he could still insist upon the repairs and alterations agreed to be made, and if not made, reduce the price agreed to be paid by the amount necessary to make them.

The charge instructed the jury that the taking away of the press by Sharpley before the time agreed upon for him to take it made a sale of the press to Sharpley, but cut him off from all the defenses which he would have had under that contract. If Sharpley had been sued in trover or in case for the wrongful taking of the press he could, if the taking was wrongful, have been held only for the value of the thing taken, and in this case the press is shown to have

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been valueless. The court, in the first charge, directs that the wrongful taking waived all the defenses which Sharpley had under the contract and made him liable for *the price* agreed to be paid, though the testimony might show that it was not worth anything. If the charge had directed the jury that the taking under the circumstances supposed made Sharpley liable for the *value* of the press, not for the *price* agreed to be paid, this would not have been objectionable, if the action had been trover or case.

Even if this charge was not erroneous, the verdict of the jury was wrong. To sustain a verdict under this charge the testimony must show "that Sharpley converted the press to some beneficial use." It was not converted to any beneficial use. It was put up and an attempt made to use it, but it would not answer the purpose.

The same objections apply to the second charge, and there are additional objections to it. It directs the jury that if Sharpley took away the press before the time stipulated he cannot complain of its "inefficiency," and must pay the price *agreed* to be paid therefor. That the taking of the press made a contract of sale, and yet the party was cut off from making all the defenses which the law gave him when sued for the enforcement of the contract.

The third charge should not have been given. It does not state the law correctly as to the warranty implied in the sale of an article by the manufacturer, the warranty implied as to the quality of a machine when sold by the manufacturer. A manufacturer impliedly warrants that machinery sold by him will be reasonably fit and proper for the purpose and use for which it was constructed so far as an article of the kind can be. Brown *v.* Murphee, 31 Miss. 91; Otts *v.* Alderson, 10 S. & M. 476; Benjamin on Sales, § 657.
* * *

Brief for appellees:

If there was an error by the court in this matter, it was certainly not in ruling or charging the jury in *our* favor. We think the court went to the extreme limit of the law, if not beyond, in charging for the appellant. * * *

The transaction was a sale of the press to Sharpley *at the price stipulated,* provided Ursery did not make a similar press by a time stipulated. Sharpley by his conduct in taking the press the next day without our consent waived this condition and elected to take the press at once. By suing for the *price agreed on* we also waive

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the condition, and agree to hold the transaction as a simple *sale* of the article for an agreed *price*.

But more than this. At the time of the trade we distinctly informed Sharpley that as the press then stood it would not suit him, that it was insufficient and defective on account of certain specified defects. There was an express *refusal* on our part to *warrant the press as it then was*. And it was expressly stipulated that if, on Ursery's failing to complete the other press, Sharpley under the agreement should take the press sued for, it was to be first *repaired and modified* and *"made all right."*

But Sharpley, by his conduct in taking the press without our knowledge or consent, waived all the defects, released us from the obligation to "make all the necessary repairs and make the press all right," took it, not only without warranty on our part, but in the face of our statements as to its insufficiency made to him, and relied on his own judgment as a "former mechanic," an *expert*.

In such case he is overwhelmingly governed by the rule of *caveat emptor*. He did not rely upon the vendor's judgment, but takes it with the warning of the vendor that it is insufficient for the purposes for which it was made sounding in his ear. Chitty on Contracts (10th Am. ed.), 476, 484.

"He must charge his loss to a presumptuous reliance on his own judgment and his improvidence in failing to obtain a warranty against defects to which the property was in its nature liable." Otts *v.* Alderson, 10 S. & M. 481.

Sharpley will not be allowed, after thus presumptuously relying on his own judgment, to come up and say that there were *other* defects *outside* of those named, which rendered the press defective, and that even if the deficiencies named had been remedied and repaired, it would still have been deficient.

The vendor is entitled to a fair showing. He distinctly *refuses* to warrant the press as it stands; and if Sharpley takes it he does so at his peril, not only *without* any warranty, express or implied, but in the face of an express *refusal* to warrant. * * *

Defendant's whole case is avowedly based on a *breach of warranty*. We think if anything *can* be proven, we have proven there *was no warranty*, but an *absolute refusal to warrant*, and a purchase by Sharpley in the face of such refusal.

An express warranty excludes the idea of any *implied* warranty. Dyer *v.* Britton, 53 Miss. 277.

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A fortiori, if the seller, for any cause, refuse to warrant, there can be no pretense for raising an implied warranty. Roderiguez *v.* Habersham, 1 Spears (S. C.), 314; Smith *v.* Bank, Riley Ch. (S. C.) 113; Watson *v.* Boatwright, 1 Rich. (S. C.) 402. * * *

If there was any error in the charges of the court, certainly defendant cannot complain of it. Our charges were so modified and emasculated by the court that the legal propositions leaned, if anything, rather in favor of the defendant, though the jury from all the testimony might well have found that the press, if repaired according to the agreement, would have been all right; and also that Sharpley converted the press to a beneficial use or at least that by his conduct he was estopped to deny it.

The charges given for the defendant, we submit, go beyond the extreme limit of the law in favor of defendant, and he certainly cannot complain of the court. * * *

OPINION.— CHALMERS, J., delivered the opinion of the court:

Reese, who was the patentee of a newly-invented cotton press, offered to construct and deliver one for Sharpley at the price of $100, warranting it in every respect. He had one already constructed and on exhibition which Sharpley desired to take; but this one Reese declined to warrant because defective, but offered to sell it on the same terms with warranty if he could be permitted to remodel and repair it in certain particulars. The next day Sharpley took and carried away the defective press, not only without waiting for the repairs to be made but also without the knowledge or consent of Reese. When sued for the price, $100, he attempted to escape payment or to reduce the price by showing that the machine was *wholly* useless. If it had been so it is by no means clear that he could have escaped payment of the full sum.

He elected to take the press after notice of its defects, and without warranty, and must be bound by the doctrine of *caveat emptor.* True, the manufacturer of goods, without a special warranty, is bound to furnish an article reasonably sufficient for the purpose for which it is sold; but in this case Sharpley must be considered as having elected to take the press without a warranty, advised though he was that it would not in its then condition fulfill the purpose for which he desired it. He could only insist upon a diminution of the price, by having the repairs made

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by Reese, and then demonstrating by proof its insufficiency as repaired. This he did not do.

The instructions sufficiently propounded the law and certainly were as favorable to defendant as he could have asked.

Affirmed.

FRANK M. MICHON v. THE STATE.

Criminal Law — Repeal of Statute Under Which Conviction Was Had — Abatement.

In a criminal prosecution where the law under which the defendant was prosecuted and convicted in the Circuit Court is repealed by the Legislature while the cause is pending in the Supreme Court and before final action is had, the prosecution must abate.[1]

Appellant, Frank M. Michon, was indicted for unlawfully selling spirituous liquors in a greater quantity than one pint without obtaining a license. He was tried and convicted at the October term, 1883, of the Circuit Court of Harrison county and sentenced to pay a fine and appealed to the Supreme Court. Before the cause was finally disposed of in the Supreme Court the Legislature repealed the law under which he was convicted. The opinion of the court contains a further statement of the facts.

APPEALED from Circuit Court, Harrison county, S. H. TERRAL, Judge.

1

After the expiration or repeal of a law, no penalty can be enforced or punishment inflicted for a violation of it, committed whilst it was in operation, unless some special provision be made for that purpose by the repealing statute. Teague's Case, 39 Miss. 516.

Where there has been a charge or repeal of the law applicable to the rights of parties after rendition of a judgment and pending an appeal, if vested rights are not affected or the Constitution does not forbid, the case must be decided in the appellate court according to the then existing law; and, although the case may have been wrongly decided in the lower court, if the decision is in conformity with the law as changed, the judgment will not be reversed. Musgrove *v.* Railroad Co., 50 Miss. 677; Somerville *v.* Mayes, 54 Miss. 31.

The repeal, without any saving, of article 17, page 388, Code 1857, in relation to equitable defenses in ejectment took away the right to interpose such defense, even in a pending case. Rice *v.* Wright, 46 Miss. 679.

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Prosecution abated, March 10, 1884.

Attorney for appellant, R. Seal.

Attorney for the State, T. C. Catchings, Attorney-General.

Brief for appellee:

The defendant was indicted, tried, and convicted in the Circuit Court of Harrison county, Mississippi, upon a charge that the said Michon, on the 1st day of January, 1882, did unlawfully sell spirituous liquors in greater quantity than one pint without having first paid the tax and without having obtained a license to sell in a less quantity than one pint.

The appellant was entitled to an acquittal for the reason that the statute under which he was indicted was repealed by the statute of 1882 before defendant was tried. It is settled by authority that after the operation of the repeal of the law no penalty can be enforced for a violation of the law while it was in force unless otherwise provided in the repealing act. Teague *v.* The State, 39 Miss. 516, and authorities cited.

The court erred in permitting the question to be propounded to witness Bond to say whether defendant had a license or not. The best evidence was the license.

The court erred in overruling defendant's motion for a new trial. It is very clear that the State failed to prove defendant guilty under the indictment, and because the statute under which he was indicted had been repealed before the trial.

Act February 2, 1890, authorizing action by revenue agents against persons selling liquors without a license to recover the privilege tax, was repealed by Code 1892, chap. 116, which did not provide for saving existing rights. *Held*, that another provision of the Code saving "existing rights," which did not take effect until several months later, did not preserve actions for the sale of liquors prior to the passage of the repealing act. Adams *v.* Fragiacomo, 71 Miss. 417, 15 So. 798.

Where a statute is evidently intended to revise the whole subject treated in a former statute, and to be a substitute therefor, it repeals such former statute, and though there may be a plain *casus omissus*, the courts cannot supply it. Clay Co. *v.* Chickasaw Co., 64 Miss. 534, 1 So. 753.

After a statute regulating the sale of intoxicating liquors has been repealed, no penalty can be enforced, or punishment inflicted, for a violation of its provisions, committed while it was in operation, unless provision be made for that purpose. Wheeler *v.* State, 64 Miss. 462, 1 So. 632.

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Brief for appellee:

The indictment was drawn under section 1112 of the Code, which provides that "if any person, without having first paid the privilege tax, and having obtained license accordingly, shall sell any vinous or spirituous liquor, in the quantity of one pint or in a greater quantity," etc., he shall be subject to indictment.

The Act of 1882 repealed the pint law and does not provide in terms for the punishment of offenses theretofore committed against it, and it is claimed that no punishment can now be inflicted for such offenses. The rule contended for is accepted by the great weight of authority and has been approved in this State. But does it apply to this case? The Act of 1882 repeals the pint law and substitutes the word "gallon" wherever the word "pint" appears in sections 1097, 1098, 1103, 1108, and 1109 of the Code of 1880, but it does not affect section 1112 under which this indictment was framed.

Manifestly that section was left intact for the very purpose of preserving the right to prosecute offenses which had been committed against the pint law. The offense was still subject to prosecution although the pint law was no longer in existence.

Again, a person having license to sell less than one pint might have sold in a greater quantity. By the Act of 1882 only two licenses could be issued; one to sell less than one gallon and the other more than five gallons. It was never intended to say that persons might sell between one gallon and five gallons. There was no intention to change the law as to this. The only change was to make the license different. From this the court may infer that there was no intention by the Act of 1882 to condone previous offenses, and this must appear before the rule invoked can apply.

There was no error in permitting witness Bond to testify that no license had been issued to defendant. He had the license himself and, therefore, the State could not produce it. However it was not necessary that the State should make any proof upon this point as has been repeatedly decided.

OPINION.— COOPER, J., delivered the opinion of the court:

Notwithstanding the amendments to sections 1097, 1098, 1103, 1108, and 1109 of the Code of 1880 by the Act of 1882, by which the word "pint" wherever it occurred in said sections was changed to "gallon," it yet remained a criminal offense by sec-

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tion 1112 of the Code to sell vinous and spirituous liquors in quantities of one pint or more without first paying the privilege tax for so doing. This section remained unamended and the offense there declared remained an offense notwithstanding the fact that by the amendments to the other sections no privilege could be obtained so to sell. The appellant was, therefore, rightly convicted.

But on the 4th day of the present month (since this case has been submitted for decision) an act of the Legislature has been passed and approved whereby the word "pint" in section 1112 has been stricken out and the word "gallon" inserted in lieu thereof.

This is a repeal of the law creating the offense for which the appellant has been convicted, and the law being repealed the prosecution must abate.

Ordered accordingly.

WILLIAM TURNAGE *v.* STATE OF MISSISSIPPI.

New Trial — Immaterial Error.

A verdict which is manifestly right will not be disturbed because an instruction given for the State is inaccurately drawn when an instruction given for the defendant correctly states the same proposition of law.[1]

Instruction — Must be Based on Evidence.

It is not error to refuse an instruction asked by a defendant when there is no evidence in the case on which to base it.[2]

Appellant, Turnage, was indicted in the Circuit Court of Lafayette county for murder. He was convicted of manslaughter and sentenced to the penitentiary for two years and appeals.

1.

All the charges must be construed together, both in civil and criminal cases; and if when so construed, the law be correctly expounded, the judgment will not be reversed, because one instruction taken by itself was too broad. Mask's Case, 36 Miss. 77; Evan's Case, 44 Miss. 762.

The giving of a bad instruction is no ground for setting aside a verdict, where it is clearly right on the law and the facts. Wiggins *v.* McGimpsey, 13 S. & M. 532; Head's Case, 44 Miss. 731; Evan's Case, 44 Miss. 762; Hanks *v.* Neal, 44 Miss. 212; M. & C. R. Co. *v.* Whitfield, 44 Miss. 466.

An improper qualification made by the court to an instruction asked is no ground for reversal, if the benefit of the rule of law claimed in the instruction be secured to the party asking it, by another instruction which is given, and

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The court gave the following instruction for the State:

"5. If the jury believe from the evidence that any witness in the case has sworn falsely, willfully, and corruptly to any material fact in the case, the jury are authorized to disregard the testimony of such witness altogether. For it is a well-established principle of law that a witness who has knowingly, intentionally, and corruptly sworn falsely to one fact in a case, is not worthy of belief as to any other fact to which he may have sworn in such case."

APPEALED from Circuit Court, Lafayette county, W. S. FEATHERSTONE, Judge.

Affirmed, January 21, 1884. Former judgment set aside, March 17, 1884.

Attorneys for appellant, Sullivan & Sullivan.

Attorney for the State, T. C. Catchings, Attorney-General.

which fully and fairly presents the rule to the consideration of the jury. Lamar *v.* Williams, 39 Miss. 342.

A new trial will not be granted for the misdirection of the judge, if the verdict be plainly and clearly right, according to the law and justice of the case, and if it would have been the duty of the judge to set the verdict aside, if found for the other party. Perry *v.* Clark, 5 How. 495.

Nor will a new trial be granted for erroneous charges where the verdict is plainly in accordance with the law and the evidence in the case. Brantley *v.* Carter, 4 Cush. 282; Cameron *v.* Watson, 40 Miss. 191; Holloway *v.* Armstrong, 30 Miss. 504; Corbin *v.* Cannon, 31 Miss. 570; Hanna *v.* Renfro, 32 Miss. 125; Simpson *v.* Bowdon, 1 Cush. 524; M. & C. R. Co., 44 Miss. 466.

Nor will a new trial be granted because the court erroneously left to the determination of the jury the construction of a written instrument, if it appear that the jury construed it correctly. Fore *v.* Williams, 35 Miss. 533.

Nor will it be granted because the court erroneously charged that certain evidence was conclusive, when it was only *prima facie*, if the point it was introduced to establish was fully proven by the other evidence in the case. Cartwright *v.* Carpenter, 7 How. 328.

Nor will it be granted in any case for error in giving or refusing a charge where the verdict is in accordance with the evidence, and the same proof should produce the same result on another trial. Simpson *v.* Bowdon, 1 Cush. 524.

Nor where the result on that trial should not have been changed by a proper charge. Pritchard *v.* Myers, 11 S. & M. 169; Hill *v.* Calvin, 4 How. 231; Wiggins *v.* McGimpsey, 13 S. & M. 532.

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Points of Counsel.

Brief of Sullivan & Sullivan:

This was a clear case of *murder* if the testimony for the State is *true*. On the other hand, it was justifiable homicide in self-defense, if the testimony for the defense is true. Therefore, the turning point in this case was the *credibility of the witnesses,* and upon this vital point the court fatally erred in charge No. 5 for State. Finley *v.* Hunt, 56 Miss. 221; Spivey *v.* State, 58 Miss. 858.

And this fifth charge is in direct conflict with the State's charge No. 3, and giving conflicting charges is error. Cunningham *v.* State, 56 Miss. 269–277; Hawthorne's Case, 58 Miss. 790. * * *

The court erred in refusing defendant's fourth charge, stating as reason for such refusal that "there is no testimony in the case authorizing such charge." Yet charge for the State, No. 7, is such charge as necessitated the granting of defendant's counter-charge. Manifestly the court erred in refusing defendant's fourth charge. * * *

An instruction for the State, erroneous when taken alone, because ignoring a defense relied on by accused, will not necessitate a reversal if defendant's instructions give him the full benefit of the defense, and all the instructions, if considered as a whole, correctly announce the law. Skates *v.* State, 64 Miss. 644, 1 So. 843; Nelson *v.* State, 61 Miss. 212.

Possession of stolen property must be recent to raise a presumption of guilt, but the omission in an instruction of the qualification that the possession must have been recent to raise the presumption, is cured by another instruction containing that qualification. Scarver *v.* State, 53 Miss. 407.

It is error to instruct the jury that they are the sole judges of the weight of the testimony and of the credibility of witnesses, and that they may, if they think proper, disregard the testimony of any witness, if for any reason they believe it to be untrue. Rylee *v.* State, 75 Miss. 352, 22 So. 890.

An error in giving a charge for the State, which is merely calculated to mislead or confuse the jury, is cured by full instructions on the subject given for defendant. Rodgers *v.* State, 21 So. 130.

An instruction for the State in a criminal case, which is defective in not requiring the jury to find certain facts beyond reasonable doubt, in order to convict, is cured by instructions given for defendant requiring such a degree of proof. Cook *v.* State, 28 So. 833.

The law having been clearly and accurately given in charges asked by defendant, mere indefiniteness and vagueness in the instructions of the court is not ground for reversal. Arbuckle *v.* State, 80 Miss. 15, 31 So. 437.

Where an abstract proposition of law is incorrectly announced by an instruction in a criminal case, and the same or similar propositions are there-

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There were manifest errors in the instructions. Conceding the evidence for defendant to be true, the defendant was not guilty but innocent. This court will then reverse, because "in this class of cases we cannot hold that the jury were not misled by an erroneous charge if there is any possible view of the testimony which would warrant a verdict of acquittal. In other words, we could only affirm a verdict of conviction despite erroneous charges *where conceding all the testimony of defendant to be true* the verdict was, nevertheless, manifestly correct." Fortenberry *v.* State, 55 Miss. 409.

"It is at least doubtful whether the vice in the instructions for the State was effectually cured by the instructions for the accused. It is certain that error was committed against him. It is not certain that it was completely removed." Hawthorne *v.* State, 58 Miss. 790.

Brief of T. C. Catchings, Attorney-General:

The fifth charge for the State is undoubtedly bad, in so far as it announces as a rule of law that a witness who testifies falsely in one particular is wholly unworthy of belief.

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after correctly set forth in other instructions, then, if taking the instructions as a whole, the court can see that no harm has been done, the error will be regarded as cured; but if the court undertakes to make a concrete application of the law to the facts of the case, instructing the jury to bring in a stated verdict if they believe in the existence of such facts, and the facts stated will not legally sustain the verdict directed, such error cannot be cured by other instructions. Harper *v.* State, 85 Miss. 338, 35 So. 572.

2.

The court may refuse instruction when there is no evidence applicable to them; and it is not error to refuse a charge, correct in principle, unless the party asking it show the evidence to which it is applicable. Loring *v.* Willis, 4 How. 383; Miles *v.* Myers, Walk. 379; Newman *v.* Foster, 3 How. 383.

Instructions must be applicable to the evidence and pertinent to the questions raised by it, and if not, they should be refused, however correct they may be as abstract propositions of law; and if inapplicable and impertinent, the giving of them will be error. O'Reilly *v.* Hendricks, 2 S. & M. 388; Payne v. Green, 10 S. & M. 507; Wiggins *v.* McGimpsey, 13 S. & M. 532; Hyde *v.* Finley, 4 Cush. 468; Wright *v.* Clarke, 34 Miss. 116; Lombard *v.* Martin, 39 Miss. 147; Herndon *v.* Bryant, 39 Miss. 335; Dennis *v.* McLaurin, 31 Miss. 606; Fairly *v.* Fairly, 38 Miss. 280.

But if purely abstract, yet if immaterial, it will not be error, though incorrect. Garner *v.* Collins, 2 Walk. 518.

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But the instructions for the defendant, and the third for the State, state the true rule fully and clearly, and I submit that the error was thereby cured.

It will be observed in this connection, that at the instance of the defendant the jury was expressly told that they must take all the instructions, those for the State and those for the defendant, and consider them as a whole. * * *

The fourth charge asked by defendants was based upon a state of facts which did not exist, and was, therefore, properly refused. It was in no sense explanatory of the seventh for the State as contended by counsel.

The testimony shows a most atrocious and unprovoked homicide, and the verdict should not be disturbed.

CHALMERS, J., delivered the opinion of the court.

We cannot think it likely that the jury could have been misled by the inapt phraseology of the fifth instruction for the State, in stating that it was a *legal* presumption rather than one of fact that a witness who knowingly testified falsely as to one material fact was thereby rendered unworthy of credit as to all his state-

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The court should not charge the jury upon abstract principles of law, not applicable to the evidence. Myers *v.* Oglesby, 6 How. 46; Powell *v.* Mills, 37 Miss. 691; Jarnigan v. Fleming, 43 Miss. 710; Evans' Case, 44 Miss. 762.

It is error to give instructions where there is no evidence on which to base them. Hogan *v.* State, 46 Miss. 274; Co-operative Assn. v. McConnico, 53 Miss. 233; Kinnare *v.* Gregory, 55 Miss. 612.

Or where they are inapplicable to the facts. Adams *v.* Power, 48 Miss. 450; Phillips *v.* Cooper, 50 Miss. 722.

And this although they are correct in the abstract. Parker *v.* State, 55 Miss. 414; Bowman *v.* Roberts, 58 Miss. 126; Railroad Co. *v.* Minor, 69 Miss. 710, 11 So. 101.

The rule in this respect is the same in civil and criminal cases. Layton *v.* State, 56 Miss. 791; Collins *v.* State, 71 Miss. 691, 15 So. 42; Fortenberry *v.* State, 55 Miss. 403.

On a murder trial, where there is nothing suggesting a doubt of the defendant's soundness of mind, unless it be merely the enormity of the crime, it is proper to refuse instructions submitting to the jury questions as to his sanity. Singleton *v.* State, 71 Miss. 782, 16 So. 295.

An instruction setting forth an agreement of which there is no evidence is fatally erroneous. Wheeler *v.* State, 76 Miss. 265, 24 So. 310.

Instructions in a criminal case, as well as a civil one, should be refused if they be upon the weight of the evidence or if there be no evidence of which to predicate them. Tidwell *v.* State, 84 Miss. 475, 36 So. 393.

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Statement of the Case.

ments; since, by the sixth instruction for the defense, they were distinctly informed that though they might believe that any witness had sworn falsely in some part of his testimony, they were not thereby compelled to disbelieve his entire testimony, but might reject a part and believe the residue as they thought proper and right, looking to all the evidence in the case.

The fourth instruction asked for the defendant was properly refused, since no witness on either side testified to any state of fact which rendered it necessary to give it; and various instructions given for the defense fully submitted to the jury the alleged state of case presented on behalf of the defense.

Affirmed.

LULA STEVENS v. WILLIAM E. MOORE.

Attachment for Rent — When not Maintainable — Code of 1880.

Unless the relation of landlord and tenant exists the statutory remedy of attachment for rent cannot be resorted to and it is essential that the demand be for rent.[1]

Attachment for rent by appellee against appellant. From verdict and judgment for defendant plaintiff appeals.

1.

Any one entitled to attach for rent under chapter 21, Code 1871, may avail of the remedy given by the Agricultural Lien Law of 1876. (Laws, p. 109.) Tucker *v.* Whitehead, 58 Miss. 762.

The purchaser of land from the landlord or at the partition sale is entitled to the rent falling due after his purchase, if not expressly reserved, and may distrain therefor, notwithstanding a rent note, previously given therefor, had been assigned by the landlord to another, who contests the purchaser's right to such rent. Watkins *v.* Duvall, 69 Miss. 364, 13 So. 727; Bowdre *v.* Sloan, 69 Miss. 369, 11 So. 631.

Since the privity of estate necessary to support an attachment for rent is destroyed by an assignment of the term, goods on leased premises (other than agricultural products), if sold by the lessee to the assignee of the term, cannot be seized for rent accruing after the assignment upon an attachment against the lessee. Nor can such assigned goods be attached for rent under section 1317, Code 1880, though on the leased premises, for the assignee is not "bound" or "liable for" the rent, there being no privity of contract between him and the lessor. Patty *v.* Bogle, 59 Miss. 491.

Although the landlord's lien passes by assignment, the assignee cannot resort to the statutory remedy of attachment for rent. Newman *v.* Bank, 66 Miss. 323, 5 So. 753; Gross *v.* Bartley, 66 Miss. 116, 5 So. 225.

The remedy is limited by statute to the landlord or the grantees of the

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Statement of the Case.

Appellant, Lula Stevens, and J. L. Stevens were the owners, as tenants in common, of certain lands in Clay county. J. L. Stevens was in possession, Lula Stevens not living in the county at the time of the rent contract. J. L. Stevens, in January, 1881, leased the lands, by a written contract, to G. H. Burkett for two years, 1881 and 1882.

At the same time the lease was executed Burkett executed his two notes payable to J. L. Stevens, one for nine bales of lint cotton, rent for the year 1881, and the other for nine bales of lint cotton, rent for the year 1882. J. L. Stevens assigned these notes to appellee Wm. E. Moore. On the trial J. L. Stevens testified that he transferred the notes to Moore about the 1st of January, 1881, and at that time it was agreed and understood that Moore was to pay one bale cotton to Lula Stevens for each of the two years of the lease as her part of the rent. Wm. E. Moore testified that he never agreed to pay Lula Stevens anything for the year 1882, the year for which the rent was claimed.

APPEALED from Circuit Court, Clay county, JAMES M. ARNOLD, Judge.

demised premises, or of the reversion thereof, their heirs, executors, and administrators. (Taylor *v.* Nelson, 54 Miss. 524, distinguished.) Gross *v.* Bartley, 66 Miss. 116, 5 So. 225.

There must be a lease to entitle to the remedy. Tifft *v.* Verden, 11 S. & M. 153.

The agent must carry on the proceedings in the landlord's name. Parker *v.* Stovall, 31 Miss. 446.

The rent must be definite. Briscoe *v.* McElween, 43 Miss. 556.

A landlord who takes the note of his tenant for rent, and afterward, during the term and before the rent is due, conveys the rented land to another, cannot thereafter attach for the rent. Watkins *v.* Duvall, 69 Miss. 364, 13 So. 727.

Goods assigned to an assignee in an ordinary voluntary assignment for creditors, which are liable to be attached for rent, may still be subjected to the landlord's demand. Paine v. Sykes, 72 Miss. 351, 16 So. 903.

The assignee of a rent note may distrain for the amount thereof. Coker *v.* Britt, 78 Miss. 583, 29 So. 833.

The assignee of a rent note who has advanced supplies to the tenant on a parol agreement that he should be subrogated to all the rights of the landlord in respect thereto is not made landlord thereby and cannot distrain for the supplies. Coker *v.* Britt, 78 Miss. 583, 29 So. 833.

There is no privity of contract between a landlord and a sub-tenant, and the former cannot maintain an attachment for rent against the latter. Ashley *v.* Young, 79 Miss. 129, 29 So. 822.

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Affirmed, January 21, 1884.

Attorney for appellant, Thos. E. Bugg.

Attorneys for appellee, Beall & Herndon.

Brief of Thos. E. Bugg:

* * * This court decided in Marye *v.* Dyche, 42 Miss. 347, "the policy of the law respecting distress for rent has been changed by our statute, and a distress for that purpose is now no more than a summary method of seizing under a writ of attachment, the tenant's property and selling the same to satisfy the rent which he owes."

So that the attachment for rent will lie in those cases now under our statute, where the common-law process of distress would. To determine Lula Stevens' rights in this case, the question arises, did the relation of landlord and tenant subsist to the extent to authorize the attachment for rent? To which there can be but one answer, that such relation *did subsist.*

"The tenancy that will authorize a distress need not necessarily be in writing, nor in any particular form, for a lease may be inferred from circumstances; a parol lease will be sufficient; and *very slight circumstances* will constitute a tenancy for this purpose; as the admission by a party holding under an agreement of a charge of half a year's rent, in an account between him and his landlord, or the payment of a previous quarter's rent." Taylor's Landlord & Tenant, § 563.

Moore *admits* that he *paid rent* for the year 1881.

"So a holding over after the expiration of a lease for a year, is a continuation of the former tenancy and subjects the tenant to a distress whether the first demise be by deed or parol. And the right subsists if the lease under which the tenant holds is void under the statute; for though it may be void, as a lease for the term, it yet inures as a tenancy *from year to year,* and must regulate the terms on which the tenancy subsists in all other respects except in *duration.*" Taylor's Landlord & Tenant, § 564; Love *v.* Law, 57 Miss. 596.

Under these authorities the charge asked in the court below in behalf of the plaintiff Wm. E. Moore, is erroneous in point of

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law, and the first assignment of error made in this court is well taken.

* * * J. L. Stevens in his testimony says that when he transferred the rent notes, executed by Burkett to Moore, "it was understood between him and Moore, that Moore should pay one bale of cotton to Lula Stevens for the rent of her interest in the land for each of the years 1881 and 1882. Moore does not contradict this statement made by J. L. Stevens, and hence it must be true. So that Moore had notice, when the rent notes executed by Burkett were delivered to him in January or February, 1881, that Lula Stevens had an interest in the land which was then the subject-matter of rent, and that her rent interest would have to be satisfied out of the notes, that he was thus receiving by transfer from J. L. Stevens, and that he promised to pay this very rent in January or February, 1881, is thrown in his teeth without his denial, makes him responsible for it, unless he can escape by the Statute of Frauds, but it has been shown by the authorities already alluded to, that as he stands in the attitude of a tenant holding over from year to year, that the Statute of Frauds will not protect him. * * *

Brief of Beall & Herndon:

* * * J. L. Stevens says that he handed over the two notes to Moore the last of January or 1st of February, 1881, and that at that time it was understood between him and Moore that Moore would pay *one bale of cotton* to Lula Stevens for the rent of her interest in the lands for each year of 1881 and 1882, that is, he was to pay her a bale of cotton 1st of December, 1881, and a bale December 1, 1882, for the rent of her interest for the land for the year 1882. This was the only time the matter was ever discussed between Moore and witness.

"There was no writing made, signed, or delivered between J. L. Stevens and Wm. E. Moore showing this agreement or understanding; it was a mere verbal agreement or understanding * * * made either in January or February, 1881."

"No action shall be brought whereby to charge any person upon any contract for the sale of lands * * * or the making of any lease thereof for a longer term than one year, or upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agree-

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ment upon which said action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith," etc. Code 1880, § 1292.

There is no privity of contract nor privity of estate between Lula Stevens and Wm. E. Moore, and, therefore, distress against Moore will not lie in favor of appellant. Patty *v.* Bogle, 59 Miss. 491.

This case is decisive of the one at bar.

J. L. Stevens may be liable to his cotenant Lula Stevens, the appellant, for rent, but J. L. Stevens was the landlord of George A. Burkett, the tenant, and George H. Burkett, the tenant, assigned the lease to Moore, yet he, as tenant of J. L. Stevens, continued liable on his contract to his landlord, J. L. Stevens. Taylor's Landlord & Tenant, §§ 436, 437; Patty *v.* Bogle, *supra.*

* * * There is a total variance between the appellant's proof and the affidavit made upon which the writ of attachment for rent was issued. There is no doubt that Moore is entitled to the cotton, unless it was rightfully seized by the officer, and the rightfulness of that seizure depends upon the truth of the affidavit. The affidavit is "that Wm. E. Moore is indebted to Lula Stevens two and one-fourth bales of cotton * * * for rent in arrears on the land * * * by virtue of a lease thereof by the said Lula Stevens for the term commencing on the 1st day of January, 1882. This affidavit is incorrect in the following particulars as shown by the proof of the appellee: First, the lease under which Moore had began on the 15th of January, 1881, and ran for two years. Second, the lease was for nine bales of cotton and not for two and one-fourth. Third, the lease was made by J. L. Stevens as lessor with George H. Burkett as lessee. Fourth, Moore never made any contract with Lula Stevens to pay her rent, but only agreed with J. L. Stevens to pay her one bale of cotton out of what he might collect on the rent notes.

CAMPBELL, C. J., delivered the opinion of the court.

The relation of landlord and tenant did not exist between the appellant and the appellee, and, therefore, attachment for rent did not lie. It is true as argued by counsel for the appellant that slight circumstances may be sufficient to authorize a finding that the relation of landlord and tenant existed, and that, where

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there is a holding over, after a lease for one year, the tenant is liable as upon the terms of the former holding, and subject to attachment, but in this case it is quite clear that there was not such holding under the appellant as to make the rules of law invoked in her behalf applicable. The land was let by J. L. Stevens. The obligations for the rent for each year were made to him as promissee. He transferred them to the appellee upon an understanding with him as assignee of the cotton obligations that he would pay or deliver one bale of the rent cotton received by him to the appellant. This did not create the relation of landlord and tenant between the appellee and appellant, and her attachment for rent was not sustained.

Judgment *affirmed.*

ELLIS TURLEY *v.* JOHN I. INGRAM.

Verdict of Jury — When it Should be Set Aside.

If the verdict of a jury is contrary to the evidence and the instructions of the court it should be set aside and a new trial granted by the court.

Instructions of the Court — On Weight of Evidence.

In a suit on a note where defendant files a set-off and there is a conflict in the evidence as to whether the defendant has not already had credit for the items claimed it is error for the court to instruct the jury to allow defendant credit for same without qualifying it by requiring the jury to determine between the witnesses as to whether in fact the same had not already been accounted for, because it is a charge on the weight of the evidence.

Same — When Error to Refuse.

Where a defendant sets up the Statute of Limitations to a claim against him and also files a set-off to the demand it is error to refuse an instruction for plaintiff that the Statute of Limitations applied to the set-off as well as to the debt sued on.

Ellis Turley brought this suit against John I. Ingram, in the Circuit Court of De Soto county on a note for $1,152.68, payable to him, signed Ingram & Co., per N. P. Turley, agent, dated

1.

If the jury find against the great preponderance of evidence a new trial will be granted. Sims *v.* McIntyre, 8 S. & M. 324; McQueen *v.* Bostwick, 12 S. & M. 604.

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March 18, 1879, due one day after date. The suit was filed September 12, 1882. Defendant filed a plea of *non est factum*, the Statute of Limitations of three and six years were also pleaded and payment. The cause was tried at the March term, 1883, and resulted in a verdict for plaintiff for $1,125.15, but defendant's motion for a new trial was sustained and a new trial granted. The cause was again tried in September, 1883, and resulted in a verdict and judgment for plaintiff for $137.75, and from that judgment plaintiff appeals.

The evidence was in substance as follows: N. P. Turley and

The high court will not grant a new trial, upon the ground that the evidence does not sustain the verdict, except in a clear case; but where instructions were given in the court below, and the jury have clearly mistaken the law, a new trial will be granted. Leflore *v.* Justice, 1 S. & M. 381.

If the jury upon questions of fact submitted to them find a verdict which is contrary to law and evidence, the court will grant a new trial. Tunstall *v.* Walker, 2 S. & M. 638.

But it will be granted where the evidence considered with reference to the issue submitted to the jury does not sustain the verdict. Otey *v.* McAfee, 38 Miss. 348.

A new trial will be granted where there is no evidence to sustain the verdict. Crocket *v.* Young, 1 S. & M. 241.

A verdict will be set aside on consideration of the facts alone if they fail to sustain it. Monroe *v.* State, 71 Miss. 196, 13 So. 884; Harris *v.* State, 71 Miss. 462, 14 So. 266.

In a civil case, where there is such a conflict of evidence that the mind cannot repose with entire confidence upon a conclusion in favor of either party, a verdict will not be disturbed in this court, no error of law having intervened. Bank *v.* Moss, 63 Miss. 74.

A finding on controverted facts, though it may be unsatisfactory, will not be disturbed, if it cannot be said that there is no evidence to support it. Railroad Co. *v.* Doggett, 67 Miss. 250, 7 So. 278.

A verdict will not be disturbed unless it is manifest from the whole record that it is clearly wrong, or unless misdirection or other apparent error may have produced it. McAlexander *v.* Puryear, 48 Miss. 420; Buckingham *v.* Walker, 48 Miss. 609.

A decree manifestly against the evidence by deposition on which it is based will be reversed on appeal. Mississippi Cotton-Oil Co. *v.* Starling-Smith Co., 23 So. 648.

Where, having been directed to find for plaintiff, a jury assessed his damages at $100, the full amount asked, the verdict will be set aside where the evidence as to the value of the two horses killed for which damages were awarded is that they were worth from $30 to $50, and in the same action the jury found the value of twenty-six other horses of the same class at $900, since the finding is evidently the result of a mistake as to the effect of the judge's instruction. V. S. & P. R. R. Co. *v.* Lawrence, 78 Miss. 86, 23 So. 826.

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Statement of the Case.

John I. Ingram formed a partnership in 1871 and went into the mercantile business, Ingram furnishing the money and Turley the experience. Turley was to manage and look after the business. The style of the firm was Turley & Ingram. N. P. Turley soon after employed plaintiff, his brother, to clerk in the store at a salary of $300 per year and his board. He was to keep a horse which was to be fed by the firm and it was to be used in his attention to their business. While thus employed Ellis Turley acted as deputy sheriff and was paid some money for his services as such. Defendant Ingram claimed credit for this money. He

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The verdict of the jury will not be reversed, on account of being contrary to the evidence, unless it most convincingly and indubitably appears to be so. King *v.* Rowan, 34 So. 325.

2.

The court has not the power to charge on the weight of evidence; yet it has the power to judge of, and charge upon, the tendency of evidence, and the exercise of this power is essential in the administration of justice. It is a power to be exercised with the greatest caution, and only where there is no room for doubt, but when the evidence wholly fails to make out the plaintiff's case, and when it does not tend in any justly legal view to establish it, it is the duty of the court to so instruct the jury. Garnett *v.* Kirkman, 33 Miss. 389; Perry *v.* Clark, 5 How. 495; Frizell *v.* White, 5 Cush. 198; Carmichael *v.* Bank of Pennsylvania, 4 How. 567; Stephenson *v.* McReary, 12 S. & M. 9; Jennings *v.* Thomas, 13 S. & M. 617; Dunlap *v.* Hearn, 37 Miss. 471; Fairly *v.* Fairly, 38 Miss. 280; Gilliam *v.* Moore, 10 S. & M. 130.

Instructions that single out and emphasize parts of the testimony are erroneous as being on the weight of evidence. Levy *v.* Holberg, 71 Misc. 66, 14 So. 537; Prine *v.* State, 73 Miss. 838, 19 So. 711.

Instructions for defendant which single out facts in evidence and inform the jury that they alone are not enough to warrant conviction are erroneous because they are on the weight of evidence. Burt *v.* State, 72 Miss. 408, 16 So. 342.

But an instruction that "a confession freely and voluntarily made is among the best evidence known to the law, and that if the jury believe from the evidence that the defendant made such a confession, then they are authorized to consider it in connection with the other evidence," etc., is reversible error, such an instruction being upon the weight of evidence and a clear invasion of the province of the jury. Thompson *v.* State, 73 Miss. 584, 19 So. 204.

On the trial of a claimant's issue an instruction which enumerates certain facts and announces that they are to be taken into consideration by the jury "as tending to show that the property did belong to defendant" is erroneous, because on the weight of evidence. French *v.* Sale, 63 Miss. 386.

And so an instruction that certain facts stated in the instructions are circumstances "indicating" a fraudulent intent, is erroneous, as being on the weight of the evidence. Ladnier *v.* Ladnier, 64 Miss. 368, 1 So. 492.

In an instruction in a criminal case, instead of referring to certain cir-

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also claimed credit for the extra horse feed, the evidence showing that plaintiff frequently had more than one horse which he fed out of the crib of the firm. In January, 1878, the firm of Turley & Ingram was dissolved and John I. Ingram assumed all liabilities and took the entire assets of the concern and employed N. P. Turley to manage the business for him.

The evidence further shows that in 1873 a settlement was made with Ellis Turley and the note of Turley & Ingram was given to him for $266, payable one day after date, and in January, 1874, another settlement was had and the note of Turley &

cumstances as "evidence" of defendant's guilt, it is better to use the language "tended to show the prisoner's guilt." Nelms v. State, 58 Miss. 362.

The jury, not the court, must determine the relative value of admissions. Accordingly, an instruction which declares that admissions, if fully and deliberately made to a disinterested person, are of weight, but that casual declarations made in idle conversation do not deserve much consideration is erroneous as being on the weight of evidence. Johnson v. Stone, 69 Miss. 826, 13 So. 858.

Instruction as to where the burden of proof lies, and directing a verdict according to the preponderance of the evidence, is proper. Meyer v. Blakemore, 54 Miss. 570; Lockhart v. Camfield, 48 Miss. 470.

Though the court may not charge upon the weight of evidence, it is not error to assume as true a fact which is fully established and as to which there is no controversy. Carberry v. Burns, 68 Miss. 573, 9 So. 290; Railway Co. v. Phillips, 70 Miss. 14, 11 So. 602; see also, Odeneal v. Henry, 70 Miss. 172, 12 So. 154; Patrick v. Carr, 50 Miss. 199; Lockhart v. Camfield, 48 Miss. 470; Landrum v. State, 63 Miss. 107; Meyer v. Blakemore, 54 Miss. 570; Kimbrough v. Ragsdale, 69 Miss. 674, 13 So. 830; Dawson v. State, 62 Miss. 241.

Where the defense to an action against the administrator of the maker of a note was *non est factum* it was error to instruct that the evidence of experts who had testified as to the maker's signature was "intrinsically weak, and ought to be received and weighed by the jury with great caution," as on the weight of the testimony. Coleman v. Adair, 75 Miss. 660, 23 So. 369.

What weight is to be given testimony and what inferences can be logically deduced from it are questions submitted, under the statute, solely to the judgment of the jury. Maston v. State, 83 Miss. 647, 36 So. 70.

3.

Where there is evidence tending to establish a material fact it is error to refuse instructions as to its effect, although the weight of evidence may tend to disprove it. Levy v. Gray, 56 Miss. 318; Nichols v. State, 46 Miss. 284; Hursey v. Hassam, 45 Miss. 133.

Defendant held to have each of his defenses fairly presented and submitted to the jury under proper instructions. Crow v. Burgin, 38 So. 625.

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Ingram was given to him for $210, payable one day after date, each of the notes bearing 10 per cent. interest.

No other settlement was made by Ellis Turley with Turley & Ingram or with Ingram & Co., until March 18, 1879, when Ellis Turley and his brother N. P. Turley got together one night in the store and N. P. Turley executed the note to Ellis Turley sued on. Both the Turleys testified that Mr. Ingram knew nothing about the settlement or the note. N. P. Turley stated that he never informed Mr. Ingram that the note had been given to Ellis Turley. The two notes formerly given, they testified, were surrendered. Ellis Turley testified that he left the next morning after the settlement and went to Missouri and stayed until the fall of 1880, when he came back but never mentioned the note to Mr. Ingram until in the summer of 1881, when he made a demand on Ingram for the money, but did not show him the note; that Mr. Ingram did not deny that he owed the money but claimed that there were some credits he was entitled to and stated that if they were allowed he would pay the balance.

Ingram testified that he never gave N. P. Turley any authority to act for him except as a mere agent to carry on the business of Ingram & Co., and to collect the debts due to Turley & Ingram and their liabilities. N. P. Turley stated that he was employed as agent to carry on the new business and to "settle up the affairs of the old concern of Turley & Ingram, to collect the debts due it and pay the old debts; that was the authority given me." Ellis Turley testified that he was employed as deputy sheriff part of the time he worked for Turley & Ingram, but he paid all fees collected, as such, into the firm business.

The opinion of the court contains a further statement of the facts.

APPEALED from Circuit Court, De Soto county, A. T. ROANE, Judge.

Reversed and new trial awarded, March 3, 1884.

Attorney for appellant, J. B. Morgan.

Attorney for appellee, T. W. White.

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Brief of J. B. Morgan:

The attention of the court is especially called to plaintiff's charges Nos. 4 and 5, and the state of facts to which they were directed.

N. P. Turley said, "I was a partner in the firm of Turley & Ingram, beginning in 1871 or 1872." "The firm of Ingram & Turley was dissolved in January, 1878, but I continued in charge of the business exercising the same powers over it that I exercised when a partner. I had been from the beginning sole manager of the entire business." He also says, "At the end of 1877, the firm was dissolved (or Turley and Ingram), and I went out of the house. * * * Mr. Ingram then went on in business under the firm name of Ingram & Co. He was to have all the assets and to pay all the debts of the old concern of Ingram & Co. I was employed as agent to carry on the new business and to *settle up* the affairs of the old concern of Turley & Ingram, to collect the debts due, and to pay the old debts. * * * I employed Ellis Turley as a clerk on the same terms that he had been employed by the old firm." "Ellis Turley (plaintiff) was fully acquainted with all the matters connected with the old firm." He gives a detailed account of the debt due plaintiff, and concludes with these words: "Making, according to our calculations, $1,152.68, and I executed Ingram & Co.'s note, as agent, for this amount."

Ellis Turley says: "The note made by my brother, N. P. Turley, was for the amount due me after paying me at the time $193 or thereabouts, and was accepted for my claim against the firm of Ingram & Turley, and Ingram & Co.

The charge was intended to instruct the jury on this state of facts and is in these words:

"The jury are instructed that when persons have been engaged in business for a number of years as partners buying and selling goods on credit and the firm is dissolved by mutual consent, and all the assets are sold to or turned over to one of the partners on his agreement to pay all the debts of the concern, then as between the partners and those accepting the arrangement such a contract is lawful and binding on the partner who thus assumes the debts of the firm, and he can appoint an agent to attend to this business, and such agent may enter into

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settlements, ascertain balances, give promissory notes for the same, bearing interest according to the custom of the merchants of the country in transacting such business and his principal will be bound thereby; provided he acts within the scope of the authority given by his principal."

And by charge five on this point the jury were further instructed that:

"The principal is bound by the acts of his agent within the scope of his authority, and this may be *either express or implied.* In determining the authority of the agent to bind his principal in a given case, the jury may look to the nature and character of his employment, and if the act done was necessary to the proper transaction of the business confided to him, then the agent had the authority to do it, and his act will bind the principal."

Again the attention of the court is especially directed to plaintiff's third charge and the state of facts it was intended to apply to.

This note sued on was executed on the 18th day of March, 1879. Plaintiff then left the State and returned in the fall of 1880. It will be borne in mind that plaintiff's $210-note was due January 1, 1874, and would be barred January 1, 1880; that his account due January, 1877, for 1876, would likewise be barred January 1, 1880, and so on with the others, but for the provisions of section 2671 of the Code, and his reliance upon the authority of N. P. Turley to settle with him and give the note, or in any event to state an account. In other words, strike out the note sued on and then when this suit was brought, September 12, 1882, the whole of plaintiff's demand was barred. But none of these were barred when plaintiff first presented his note to defendant and he could, and would have sued, had the act of N. P. Turley been repudiated then * * *.

The instruction is in these words: "It is the duty of the principal to disaffirm the act of his agent promptly when informed thereof; and the jury are instructed that if the defendant knew of the act of the agent, and by silence acquiesced therein, then he will not be permitted to repudiate it, when to do so would place the creditor who relied on the authority of the agent at a disadvantage.

And if the jury believe from the evidence that defendant

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knew of the execution of this note and acquiesced therein, then he will not be permitted to repudiate the act after a year of silence, when the same would injure the plaintiff."

The act of N. P. Turley was never repudiated until at the trial term of this cause and after full consultation with his attorney, he was permitted to file a plea of "*non est factum*" and then invoke the statutes of limitation, when plaintiff's claim was wholly barred. None of his claim was barred when plaintiff presented the note in 1880 or 1881. None of it was ever barred except the $260-note given in 1873, and even if N. P. Turley had no authority to include this note in March, 1879, it would not affect the balance of the note, any more than if he had made that amount of mistake in his addition. The note would have failed to that extent only. As the jury reduced plaintiff's debt about $475, they may have struck out the whole note for $260. In any event, they had the whole evidence before them and much of it showing that Turley's agency was coextensive with that of a partner. The witnesses say that there was no difference in his powers before and after the dissolution. * * *

It is submitted that the jury did not disregard the foregoing instructions, at least, and that they were pertinent to the issue joined, and justice was done.

Defendant's third charge is erroneous in asserting that express authority is necessary to waive the statutes of limitation, or increase the rate of interest. This may be either express or implied. The true rule is announced in plaintiff's fifth charge. The charge is calculated in any event to mislead the jury.

Defendant's fourth charge is erroneous as applicable to this case, and should have been modified. The evidence showed a continuous course of dealing that brings the case fully within the statutory rule.

Defendant's fifth and sixth charges are erroneous. They denounce as fraudulent and void any acts of the two, without charging any combination, agreement, or intention of the parties to cheat or defraud their common employers. * * *

The plaintiff in support of his first assignment of error refers the court to Graham & Waterman on New Trial, Vol. I, p. 380, and cases cited, especially, Ashley *v.* Ashley, p. 380; Sevain *v.* Hull, 380; Lewis *v.* Peak, 382; Baker *v.* Briggs, 388.

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The verdict will not be set aside where there has been evidence on the point at issue on both sides. Nor will the verdict be set aside where substantial justice has been done. Same book, and cases cited. See p. 394 for statement of the rule. * * *

On the second trial, it is insisted by plaintiff: First, That the jury found contrary to the law and the evidence. On this point, counsel for plaintiff can only ask the careful consideration of the whole case which is much fuller than on the first trial. The itemized accounts from defendants books are not brought forward, because they were considered part of plaintiff's declaration under the agreement and on the trial.

The court erred in modifying plaintiff's second charge. The court was asked to charge the jury "that the whole is equal to the sum of all its parts." The court was willing to instruct the jury that a principal might confide to an agent power to do anything in the scope of his business that he himself might do, and that the jury are to judge from the whole evidence of the powers the agent was authorized to exercise. But if he propose, in the scope of this business to do what his principal could do, renew a debt barred by the statute, then in addition to all the powers his principal can confer on him to do as he would or could do himself, he must have express authority for this class of business.

The court erred in refusing plaintiff's charge number four. Defendant's set-off shows items of account for 1873–5, etc. Defendant having asked and obtained charges on the statute of three and six years. Plaintiff asked the benefit of the rule as to defendant's *set-off* to nearly all of which the statute applied. This charge was refused at first by reason of section 2687 of the Code. It was then put in its present shape so as to antedate the Code and bring the whole before the court for construction. The meaning of section 2687 of the Code of 1880 is to apply items of set-off as *payments* at the time and prevent great injustice. The rule applied by the court below continues the injustice legislated against, but changes it from the defendant to the plaintiff. Whether the statute applies or not is made to depend upon who is plaintiff. If Ingram had sued Turley, the whole of his claim would under this rule be barred. As it is, none of it is so held. This is not the law, and plaintiff was injured.

Defendant's first charge is erroneous. It instructs the jury

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that if the $1,152-note (the one in suit) has included in it any note of Turley and Ingram, or transaction, which of course embraces accounts, then the note is void unless express authority was had from Ingram. This is not only erroneous, but is in direct conflict with plaintiff's fifth charge, where the jury are instructed that this authority may be implied. The true rule is stated in plaintiff's charge, and the effect of this is to destroy it.

Defendant's ninth charge is erroneous. It is a charge directly upon the weight of evidence. They are instructed to allow defendant credit for any sum that plaintiff earned as deputy sheriff. * * *

The plaintiff asks the court to reinstate the first verdict and for judgment here. If not, then that the cause be reversed and remanded.

Brief of T. W. White:

The first question presented to the court is, did the court below err in setting aside the verdict rendered on the first trial, as is alleged by plaintiff as his *first* assignment of error.

The testimony of the two Turleys alone would, we think, show so much corruption and illegality as would require any court to set aside a verdict rendered on it. But when to this is added the testimony of Ingram & Nicholls and Cooper Maxwell, the preponderance against the verdict is so great that it will not stand for a moment. The whole proof, with any opposing testimony shows that N. P. Turley had no right to give the note sued on. That as a member of a dissolved partnership he could not waive the Statute of Limitations or turn a 6 per cent. into a 10 per cent.; that as agent he could not do it, except with express authority to do so; that as the agent of Ingram & Co., he had no right to make such a note, and that, therefore, the plea of *non est factum* was good. Nor is there anything in the testimony to show that Ingram ever gave him any such authority, in his testimony he speaks of himself as "agent."

It will be observed that N. P. Turley, though the leading witness for plaintiff, nowhere testified that he had any express authority to waive bar of limitation, to increase rate of interest, either as agent for Ingram or as agent to settle up old firm.

Nor could Ellis Turley have any reason to think he had such

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authority. The two brothers were coagents of Ingram and both knew his exact relation to them and their firm. It is claimed that N. P. Turley was held out to the world as fully empowered to do anything. There is no proof of that. The proof to Turley himself was that "he was agent to settle up old business and carry on the new," and as such agent he could not give the note in question, and Ellis could not be mislead by it.

Acquiescence on the part of Ingram is invoked. The proof shows no acquiescence on his part. He repudiated the note when first brought to his notice in 1881, though it was not shown him, and he did not know whether it was signed by "Turley & Ingram" or in the manner it was; he did not know its date or whether it purported to be signed before January, 1877, or not. Hence he offered a compromise; he was in very low health, thought he had consumption, and had not long to live; had been in bad health for several years and did not want to leave such a claim unsettled. * * *

As to plaintiff's second assignment of error, the testimony on second trial being much the same as on the first, but in some respects more favorable to defendant, I assume that plaintiff does not claim a new trial because the verdict is against the evidence.

Plaintiff assigns for third error that the court below modified charge number two, asked by plaintiff. We are satisfied the modifications made by the court are correct and coincide with the law and will not argue the point further.

Plaintiff assigns for error the modification made by the court to third charge. These modifications are proper.

Appellant's fifth assignment of error can have no application to *this* case and was clearly not the law. The charge would make the court say — that all the items of defendant's set-off more than three years old (excluding plaintiff's absence in Missouri) could not be considered in this suit. This is in the very teeth of the statute, section 2687, which says, that such shall be used if held by the defendant before they were barred. The proof shows that every item of the set-off was so held.

Plaintiff assigns for error the giving by the court of the first charge. This charge is: "If Ellis Turley held a note on Turley & Ingram, due January 8, 1873, then such note was barred by

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the statute on 11th of January, 1879, and if the firm of Turley & Ingram was then dissolved, Turley had no authority to revive said note, but the same is no longer binding on Ingram."

This is complained of as a charge on the weight of evidence. This is a mistake as to the object of the charge, which only went to the extent of saying that after the dissolution of the partnership Turley had no right as partner to sign a note which would revive one already barred by the Statute of Limitation. The court had offered to give two charges which expressly stated that Turley might *as agent* waive the statute and revive a note already barred "if he had express authority to do so," which plaintiff had declined.

The court had also charged on the former trial that an *agent* might do the same thing, and these charges were had by the plaintiff on this trial.

The second charge for defendant, which is objected to, states the law correctly and makes the distinction between the signing of a note by an agent and the signing of a note by a partner of a dissolved partnership. It states that if Turley signed the note sued on as the agent of Ingram and included in it any note or transaction which belonged to the dissolved partnership, then the note was made without authority and is void unless he had express authority from Ingram to execute the note.

The second branch states that if Ellis Turley held a note on the firm of Turley & Ingram, due January 8, 1873, that the firm was dissolved in 1878, and that afterward N. P. Turley a *partner* of the dissolved firm, on 18th of March, 1879, when said note was barred by the Statute of Limitations, included it in the note sued on, such act was without authority and the note was void as to the amount of said barred note, and there is no liability on the part of Ingram to pay the note thus barred.

The proof of Turley himself was that he was only an agent to settle up the old business, collect debts, and pay liabilities. "If so," says the court, "you are not authorized to sign any note to waive the Statute of Limitations. If you are the agent of Ingram & Co., you cannot as such agent make a note and include in it notes and transactions of the former firm of Turley & Ingram, and if you do the act is void." If the firm of Turley & Ingram was dissolved in 1878, Turley, one of the partners, had not right

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to revive a note already barred or include it in another note, and if he does, it is void to the extent of the barred note so attempted to be revived.

Plaintiff objects to charge nine for defendant. It is insisted that the charge was correct. If plaintiff kept horses that he had no right to keep at the expense of defendant, then certainly he ought to pay what it was proved to be worth; and if, while in the employ of defendant, he earned money as deputy sheriff, riding a horse fed by defendants, whatever money he so coined, belonged to defendant, his employer. * * *

COOPER, J., delivered the opinion of the court.

Unless the defendant was bound by the note sued on, the debt due to the plaintiff was barred by the Statute of Limitations, and no recovery could have been had. Whether the plaintiff could recover in whole or in part on the note depended on three questions:

1. Did E. P. Turley, as agent of Ingram in winding up the affairs of Ingram and Turley, have authority to bind Ingram by the execution of a note for the debts of that firm? If he did have such authority the plaintiff was entitled to recover so much of the note as was given for debts not barred by limitation at the time of its execution.

2. Did E. P. Turley have authority, as the agent of Ingram in conducting the firm of Ingram & Co., to execute a note for the debt due by Ingram & Co.? If he had such authority, but did not have authority to give a note for the debt due by Ingram & Turley, then the plaintiff was entitled to recover on the note so much as was due him by the firm of Ingram & Co.

3. Had Ingram ratified the act of Turley in executing the note sued on?

By the first verdict the jury responded in the affirmative to the first and third interrogatories. This verdict was set aside by the court. This verdict we think was contrary to the evidence and the instructions of the court, and the court rightly refused to permit it to stand. It is evident that the jury which returned the second verdict answered the first and third interrogatories in the negative and the second in the affirmative.

We cannot say that this idea was opposed by the evidence. This verdict was for less than the sum which the plaintiff's evi-

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dence showed was due by Ingram & Co., to him, and the inquiry is whether the jury was or might have been controlled by erroneous instructions given for defendant, or whether plaintiff was refused instructions he should have received. Looking to the testimony adduced we see that the defendant claimed credits against plaintiff's demand: 1. For fees earned by the plaintiff in acting as deputy sheriff while in their employment. 2. For extra horse feed furnished to him by defendant. The plaintiff testified that he had paid the firm all fees received by him as deputy sheriff; the defendant introduced evidence tending to prove the contrary. The court charged the jury that the defendant must be allowed for all such fees received by the plaintiff, without qualifying this charge by instructing the jury that it was to determine between the witnesses as to whether in fact these fees had already been accounted for, and if such was the fact, then the defendant having already had the fees could not again have credit therefor. As given, the instruction in effect told the jury to find the fact to be as testified by the witnesses for the defendant, and was a charge on the weight of evidence.

The plaintiff asked the court to instruct the jury that the Statute of Limitations applied to set-off as to the debt sued on, which instruction was refused. This was error. If the plaintiff's demand against Ingram & Turley was barred by limitation, so also was theirs against him for the fees received by him and for the horse feed furnished.

For these errors, the judgment will be reversed and a new trial awarded.

ELLEN PORTER v. THE STATE.

Judgment of a Circuit Court — When Reversed on the Facts.

The judgment of a Circuit Court will be reversed on the ground that the verdict is wrong when no error of law is complained of if the evidence is insufficient to support the verdict of the jury.[1]

Appellant, Ellen Porter, was indicted in the Circuit Court of Lee county, for murder for the killing of her infant. She

1.

The question in such a case is not, is the verdict clearly right, but is it manifestly wrong? Waul *v.* Kirkman, 13 S. & M. 599; Prewett *v.* Coopwood, 30 Miss. 369; Drake *v.* Sarget, 36 Miss. 458.

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was tried, convicted and sentenced to the penitentiary for life and appeals. The only error assigned is that the court erred in overruling the motion for a new trial because the facts were not sufficient to sustain the verdict.

On the trial there was proof that defendant had been delivered of a child, but the only witness as to whether the child was alive was one Alf Lagrone, who testified as follows: "I was at Mr. James Graham's house and went down to Lewis Porter's house, the father of defendant; I suppose the houses are about 150 yards apart. I did not go into the yard but went along the road and come to the south gate; there is an east gate and a south gate; the house in which Lewis lived had a chimney in the west and a door in the south; the garden is west of the house and the garden gate a little south of the house. When I stopped at the south gate I saw the defendant go into the garden and pick up a cane. Lewis, her father, said, 'Ellen what are you going to do?' She said nothing, defendant then walked out of the garden and between the garden and the chimney and Lewis started off toward the white folks' house. Ellen went to the back of the garden near the northeast corner and picked up something in her hands and I heard a noise like a small puppy. She raised the object above the cotton stalks and carried it in her hands

And the test is, is there evidence fairly to support the verdict? Guion *v.* Doherty, 43 Miss. 538.

If the jury upon questions of fact submitted to them find a verdict which is contrary to law and evidence the court will grant a new trial. Tunstall *v.* Walker, S. & M. 638.

But it will be granted where the evidence considered with reference to the issue submitted to the jury does not sustain the verdict. Otey *v.* McAfee, 38 Miss. 348.

A new trial will be granted where there is no evidence to sustain the verdict. Crocket *v.* Young, 1 S. & M. 241.

A case of circumstantial evidence, charge murder, in which the high court reviewed the evidence, and reached the conclusion that it was impossible to ascertain from the evidence, with any reasonable certainty, how deceased came to his death, or who was the guilty agent, and reversed the case. Caleb's Case, 39 Miss. 721.

A new trial will not be granted on the evidence alone, unless the verdict be opposed by a decided preponderance of evidence, or based on no evidence. Cicely's Case, 13 S. & M. 202; McMann's Case, 13 S. & M. 471.

And power to set aside on the ground that verdict is opposed by decided preponderance of evidence is exercised with great caution. McMann's Case, *supra.*

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toward the west; I saw it; it looked dark; she looked toward where her father was going and tossed the object she had in her hands over about two cotton rows and I again heard a noise like a little puppy." Several witnesses testified that Alf Lagrone was unreliable and could not be believed. Defendant's motion for a new trial was overruled and she appeals.

APPEALED from Circuit Court of Lee county, J. W. BUCHANAN, Judge.

Reversed and remanded, January 28, 1884.

Attorney for the State, T. C. Catchings, Attorney-General.

Attorney for Appellant, W. L. Clayton.

Brief of W. L. Clayton:

This was an indictment in the Circuit Court of Lee county for murder, preferred against defendant, charging her with killing of her own infant. The only error assigned is because the Circuit Court erred in overruling the motion for a new trial, and this brings in question the sufficiency of the evidence to sustain the verdict. The case, so far as the fact of the *living child,* is concerned is, as I take it, wholly dependent upon the

This is especially so in cases of circumstantial evidence. Browning's Case, 33 Miss. 48.

While the trial judge should use great caution not to set his opinion against that of the jury, he should not hesitate to set aside any verdict not supported by evidence. Dobson *v.* State, 67 Miss. 330, 7 So. 327.

Reluctant as this court is to disturb a verdict upon the sole ground of the sufficiency of the evidence, where there is a palpable failure of proof to sustain the verdict, it will not be allowed to stand. Harris *v.* State, 71 Miss. 462, 14 So. 266.

A verdict will be set aside on consideration of the facts alone if they fail to sustain it. Monroe *v.* State, 71 Miss. 196, 13 So. 884; Harris *v.* State, 71 Miss. 462, 14 So. 266; Dobson *v.* State, 67 Miss. 330, 7 So. 327.

A conviction will not be disturbed merely because the jury might, without being censurable, have acquitted. Skinner *v.* State, 53 Miss. 399.

Where there is no error in the instructions this court will not disturb a verdict unless under the evidence it is clearly wrong, or except in a clear case of error, prejudice, or passion. Gamblin *v.* State, 45 Miss. 658.

The verdict of the jury will not be reversed, on account of its being contrary to the evidence, unless it most convincingly and indubitably appears to be so. King *v.* Rowan, 34 So. 325.

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evidence of Alf Lagrone. I do insist that the evidence is insufficient to sustain the verdict. Proof must be made that the child was alive. The nearest approach to it is by Lagrone who says that he heard something make a noise like a young puppy when Ellen was carrying something to the west from the northeast corner of the garden, but the witness did not pretend to state that the noise proceeded from the direction of the defendant. Again, this witness told W. F. Cunningham that there was a puppy in the yard at the time. It seems to me to be a *judicial trifling with life* to condemn a party on such evidence. It was always required that the proof should show that the child was born alive, by clear and satisfactory evidence. Here, the only evidence we have is from an ignorant negro, who only saw something in the defendant's hands at some distance, and heard a noise like a young puppy, and who is shown by the evidence of two disinterested witnesses to have been unworthy of belief, and it is also shown by both the Cunninghams that the witness could not have seen what he said he did and from the place he said he was standing at the time. The testimony is short. I call the court's special attention to it.

Brief of T. C. Catchings, Attorney-General:

The case rests wholly upon the question as to the sufficiency of the testimony.

While there was some testimony tending to impeach Alfred Lagrone's, it was only by indirection, and his testimony is fully supported by the circumstances narrated by others.

If the child was not born alive, what made the noise heard by him? The woman certainly was delivered of a child, and certainly took it out into the yard to conceal it. There were pools of blood and the remains of the child to show this. We are bound to believe that Lagrone told the truth, and if so, the noise he heard must have been made by the child.

CAMPBELL, C. J., delivered the opinion of the court.

We are reluctant to reverse a judgment of the Circuit Court purely upon the ground that the verdict is wrong, where no error of law is complained of. That is the attitude of this case. The only error assigned is that the evidence is not sufficient to

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support the verdict, and after the fullest consideration we are constrained to declare our concurrence in this view.

That the accused was delivered of a child and sought to conceal it is shown, but that the child was born alive is not satisfactorily shown. The only witness whose testimony relates to that fact is shown to be of bad reputation for truth and unworthy of belief, and his narrative is in itself highly improbable, as it appears to us. The act of the accused in trying to hide her shame is not suggestive that the child was born alive. She doubtless desired to conceal the fact of her condition.

Judgment reversed and new trial granted.

S. P. HUDDLESTON et al. v. THE STATE.

A Scire Facias is a Pleading as well as Process and is Amendable.

A scire facias on a judgment *nisi* on forfeited recognizance is the complaint in a proceeding as well as process, and when made returnable to certain term of court, service should be had on defendants five days before the term and not so served, a judgment rendered by default at that term of the court is void.[1]

A recognizance was taken by the sheriff of Chickasaw county for the appearance of James Taylor to answer a charge of grand larceny. The recognizance recites that John Taylor, principal,

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A scire facias on a judgment *nisi* is to be regarded as a declaration as well as process, and is amendable, as other pleadings. Carey's Case, 39 Miss. 511.

Under the stringent rules on the subject, a scire facias upon a judgment *nisi* rendered upon forfeited recognizance, which recites the legal effect of the recognizance but not its terms, is insufficient; but being both a pleading and process it may be amended so as to conform to the recognizance. Tucker *v.* State, 55 Miss. 452; Pounds *v.* State, 60 Miss 925.

As to the nature of the writ, whether an execution or original process, see Pollard *v.* Eckford, 50 Miss. 631.

A scire facias which cites defendants to appear at the next term of the Circuit Court to be held in G. is not void for omission of the day of the month, as the law fixes the date for the beginning of the term. State *v.* Ricketts, 67 Miss. 409, 7 So. 282.

Where sureties on a recognizance have been served, but fail to appear on the scire facias, they cannot predicate error on a variance between the bond and the scire facias, the bond not being properly a part of the record of the scire facias proceedings. Smith *v.* State, 76 Miss. 728, 25 So. 491.

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and the sureties agree to pay the State of Mississippi $300, unless John Taylor shall appear at the next term of the Circuit Court of Chickasaw county, and from day to day and term to term until discharged, to answer a charge of grand larceny. It does not state when or where the said term of court would be held. Appellants, Huddleston and others, were the sureties on the bond. Taylor did not appear at the next term of that court and a forfeiture was taken on the bond and a judgment *nisi* was rendered against him and his sureties. On this judgment a scire facias was issued, returnable to the September, 1883, term of the court of said county which convened on the 17th day of that month. Defendants were served with process on the 14th day of September, just three days before the return day of the court. They did not appear and on the 18th day of September final judgment, by default, was rendered against Taylor and his sureties. From that judgment this appeal is taken.

APPEALED from Circuit Court of Chickasaw county, J. W. BUCHANAN, Judge.

Reversed and remanded, January 21, 1884.

Attorneys for appellant, McIntosh & Williams.

Attorneys for State not named, in record.

Brief of McIntosh & Williams:

We insist that the judgment of the Circuit Court should be reversed.

1. Because of the variance between the recitals in the recognizance and those in the writ of scire facias. The recognizance provides that John Taylor, principal, and the sureties therein named agree to pay the State $300 unless John Taylor shall appear at the *next term* of the Circuit Court of the Second District of Chickasaw county and from day to day and from term to term until discharged by law, to answer a charge of grand larceny. It does *not recite when or where* the next term of the Circuit Court of the Second District of Chickasaw was to be holden. * * *

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The scire facias recites, that in the recognizance these sureties obligated themselves to have their principal, John Taylor, present "at the next term of the Circuit Court, to be holden thereafter at the courthouse in the town of Okolona on the third Monday of March, 1883," etc. The utmost precision and particularity is required in the proceeding. In the case of Tucker *v.* State, 55 Miss. 453, the judgment was reversed, the cause remanded, with leave to the district attorney to amend the scire facias. In that case the recognizance bound the recognizor to appear at the May term, 1874, and to attend said court from day to day and term to term until regularly discharged. He failed to appear at the September term, 1876, and judgment *nisi* was rendered. The scire facias recited a recognizance to appear and answer at the September term, 1876.

This court, in its opinion, admitted that undoubtedly the recognizance did bind the party to appear and answer at all the succeeding terms, until discharged, and whilst this was its legal effect yet the court says, "under the stringent rules heretofore announced by this court, in many cases, as to the necessity of making the recitals of the scire facias *conform strictly* to the terms of the recognizance, we do not feel authorized to affirm the judgment below," and cites the case of Curry *v.* The State, 39 Miss. 511; Overaker *v.* The State, 4 S. & M. 738; Daingerfield *v.* The State, 4 How. 658; Douthit *v.* The State, 30 Miss. 133. * * *

The scire facias is to be regarded as a complaint in the proceeding as well as the process or writ by which the defendant is summoned to appear. Curry *v.* The State, 39 Miss. 515.

Such being the case it was clearly error in rendering judgment against the appellants at the September term, 1883, of the Circuit Court of the Second District of Chickasaw county, which by law convened on the third Monday of September, which was the 17th day of the month, as shown by the calendar for that year, when the return of the sheriff shows service was not had on them until the 14th of September, which was the last Friday before court.

Section 1525 of the Code of 1880 provides, that "the summons shall be made returnable on the first day of the term, and shall be executed *five* days before the return day thereof, and if it shall

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be executed within five days before said return day, it shall be good to require the appearance of the party at the next term after that to which it is returnable."

Section 3043 provides, that the scire facias may issue returnable to the next term of such court as in *other cases,* referring of course to the requirements of section 1525, that theory is sustained in the case of Curry *v.* The State, above cited.

The record shows that the service was had but *three* days before return day, and a judgment final was rendered on the 18th day of September, which was the second day of the court, and only *four* days after service.

Brief for the State is not found in the record.

CHALMERS, J., delivered the opinion of the court.

The writ of scire facias was served less than five days before the first day of the term to which it was returnable. It was, therefore, error to take judgment by default at that term.

The scire facias did not follow literally the recitals of the recognizance as it should have done, but as it is amendable this can be remedied on the return of the case to the Circuit Court. Tucker v. State, 55 Miss. 453.

Reversed and remanded.

J. R. NUSOM *v.* THE STATE.

Criminal Law — Jurisdiction of Courts.

The Circuit Court of one county has no jurisdiction to try a case when it is shown that the offense was committed in another county.[1]

Appellant, J. R. Nusom, was indicted in the Circuit Court of Claiborne county for grand larceny. He was tried at the Novem-

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The offense must be proven to have been committed in the county in which the indictment was found, or the court will have no jurisdiction, and if the bill of exceptions certify that it contains all the evidence, and there be no proof of venue in it, the verdict will be set aside, though no objection was made on that point in the court below. Vaughan's Case, 3 S. & M. 553; Coon's Case, 13 S. & M. 246.

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Statement of the Case.

ber, 1883, term of the Circuit Court of that county and convicted and sentenced to the penitentiary. The evidence for the State showed that the acts constituting the offense charged were committed in Jefferson county. His motion for a new trial was overruled and he appeals.

Venue may be proved by circumstances and reference to localities familiar to the jury. Rigg's Case, 30 Miss. 635.

If a party be convicted of an offense, without proof of the fact that it was committed in the county in which the venue is laid, the verdict and judgment will be void. This proof is essential. Green's Case, 1 Cush. 509.

Venue must be proven as laid down in the affidavit or indictment, and where the record, on appeal, fails to show that the offense was committed in the county where alleged judgment of conviction will be reversed. Thompson *v.* State, 51 Miss. 353.

Venue is part of the offense and must be proved. If the evidence raises a violent presumption that the offense was committed in the county of the trial, the venue is sufficiently shown. But where the evidence shows that accused stole cattle in one county and was seen in the county near the line, driving the cattle toward his home in an adjoining county, but they were never seen therein, and when he entered the town in which he lived he had no cattle, there is not sufficient proof of venue to warrant a conviction in the last mentioned county. Moore *v.* State, 55 Miss. 432.

Where an offense was committed in one county, and before any prosecution is begun a new county is formed, including that portion of the county wherein the offense was committed, the Circuit Court of the new county has jurisdiction to try the offense. Murrah *v.* State, 51 Miss. 675.

Where a county is divided into two judicial districts, a conviction of murder must be in the district in which the offense was committed; otherwise it will be reversed for want of jurisdiction. Spivey *v.* State, 58 Miss. 858.

Where an indictment for murder charges that the crime was committed in the county in which it was preferred, evidence that the death occurred in another county is admissible, if the fatal blow was struck in the county in which the indictment was found, under Code 1892, § 1335, providing that where the fatal blow is struck in one county and death occurs in another the offender may be tried and indicted in either county. Coleman *v.* State, 83 Miss. 290, 35 So. 937.

If one accused of murder be indicted in the county where the death occurred, he cannot afterward be indicted in another county where the fatal blow was struck, although the first indictment be dismissed by the state, since Code 1892, § 1334, provides in such case, that the jurisdiction shall be in either county where the prosecution shall first be begun. Coleman *v.* State, *supra.*

In such case the fact that there is no contest between the courts of the two counties does not deprive the defendant of the right to object to the jurisdiction of the court of the county where the prosecution was not first begun. Coleman *v.* State, *supra.*

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Points of Counsel.

APPEALED from Circuit Court, Claiborne county, J. B. CHRISMAN, Judge.

Reversed and remanded, April 5, 1884.

Attorneys for appellant, Martin & McLaurin.

Attorney for State, T. C. Catchings, Attorney-General.

Brief of Martin & McLaurin:

Appellant's first assignment of error is: "Because the State failed to show that the alleged taking and sale of said yearling was in the jurisdiction of the Claiborne Circuit Court."

The evidence shows that the whole transaction respecting the sale and delivery of said yearling occurred in the county of Jefferson. There is no doubt about the county in which the alleged offense was committed.

This being the case the Circuit Court of Claiborne county was without jurisdiction. Any judgment of the court was erroneous, null, and void. The first assignment, then, is fully sustained, and the judgment of the court ought to be reversed and Nusom discharged. Rev. Code, 1880, § 2991.

The discussion of assignment number one settles the case without further consideration of the assignments of error. * * *

Brief of T. C. Catchings, Attorney-General:

As to the venue, the most that can be said, is that the testimony leaves it doubtful whether the larceny was committed in Claiborne or Jefferson county. That the sale took place in the latter county is true, but it does not follow from this that the larceny was committed there.

The testimony shows that the yearling was raised in Claiborne county, and that after being carried to Jefferson county it strayed back to the old range in Claiborne, which was about a mile from Nusom's house.

Under section 2991 of the Code the venue is, therefore, sufficiently established.

Opinion.— PER CURIAM:

Because it plainly appears that the offense of the appellant, if any, was committed in Jefferson county and not in Claiborne, we reverse the judgment, and remand the case for a new trial.

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BAILEY & RHODES *v.* JOHN HENRY & CO.

Custom — Implied Contract.

Where plaintiff has sold many goods to defendant, and the invariable rule has been that the sales were on sixty days time, it will be inferred that their dealings are to be governed by the custom unless something to the contrary is shown.[1]

Code of 1880, § 1626 — Affidavit to Open Account — Burden of Proof.

In a suit on an open account sworn to under section 1626 of the Code of 1880 when defendant files a counter affidavit denying a material matter the burden of proof is on the plaintiff and judgment should be rendered for the defendant unless plaintiff introduces proof to overcome the affidavit.[2]

Suit by appellees against appellants on open account. From verdict and judgment for plaintiffs defendants appeal.

APPEALED from Circuit Court, Harrison county, S. H. TERRAL, Judge.

Reversed and remanded, March 10, 1884.

Attorney for appellants, R. Seal.

Attorney for appellees, Elliott Henderson.

Brief of R. Seal:

* * * At the November term, 1883, of said Circuit Court, by leave of court, the defendants filed an amended affidavit, then by consent of both parties a jury was waived and said cause sub-

1.

It is competent to show by the custom of merchants that, when cash is not paid for goods, the sale is on the customary credit. Effinger *v.* Henderson, 33 Miss. 449.

A particular custom of merchants only affects contracts made in that locality where it is shown to exist. Allen *v.* Lyles, 35 Miss. 513.

Where, on an accounting between complainant and a merchant, it appears that the separate accounts of complainant's tenants and croppers had been charged to his account and had been carried into the settlements, and notes executed for the balances due, it was error to disallow such items for lack

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mitted to the presiding judge. Plaintiffs moved to strike from the files this amended affidavit because as stated it did not traverse plaintiff's affidavit, motion to strike out sustained and defendant excepted. Plaintiffs then submitted his account with the affidavit attached to the court and closed without further testimony. The defendants then read to the court their counter-affidavit to plaintiff's affidavit, then introduced Mr. Rhodes, one of the defendants, who testified that he bought the bill of goods on sixty days credit. That all parties were citizens and domiciled in the city of New Orleans, State of Louisiana, and that the account sued on was not due when suit was commenced; that the sixty days had not expired. The defendant then offered to read in evidence a duly certified copy of the judgment of respite, plaintiff objected, and sustained by the court; defendants excepted; the testimony was now closed. The court rendered judgment in favor of plaintiffs for $102.05, with interest and costs.

There is no special pleading before a justice of the peace court, and when appealed to the Circuit Court it is tried *de novo*. The court will look to the substance and not to the form. 52 Miss. 681.

Plaintiff's affidavit had not been filed with their account when suit was brought; only makes out a *prima facie* case. Then the counter-affidavit of defendants does away with the *prima facie*

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of positive evidence of a contract by complainant to pay them, it being shown that such charges were in keeping with the usual course of business between the landowners and their tenants. Dickerson *v.* Thomas, 67 Miss. 777, 7 So. 503.

A custom in a business, existing among all those engaged therein in a certain city, is a general one, with reference to which it will, in the absence of rebutting evidence, be presumed that obligations touching the business are assumed. Burbidge *v.* Gumbel, 72 Miss. 371, 16 So. 792.

Where meat contracted for was "smoked meat," it is immaterial that the meat sold upon breach of contract by the seller for the purchaser's account was not smoked, it being shown that the meat was sold to be shipped on the buyer's order, that "smoking" is a process to which meat is submitted, according to the custom of the trade, only immediately prior to shipment, and that the buyer failed to give shipping directions. Bonds *v.* Lipton Co., 85 Miss. 209.

In the absence of special contract the fact that the storage charges sued for had been uniformly imposed was admissible to show that defendant agreed to pay them. Planters' Compress & Warehouse Co. *v.* Ireys, 16 So. 386.

A custom of a common carrier not to give notice to the consignee of the arrival of goods will not terminate its liability as carrier, but the same will

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case and throws the burden of the proof upon plaintiffs to prove up this account, and especially to show that it was due when this suit was commenced, having failed to prove his account, defendants are entitled to a judgment of nonsuit and costs. Here the court erred.

The testimony shows that the account sued on was not due. The court erred in ruling out the record from Louisiana. This was an order and judgment of respite. It is in the nature of an insolvent law. Art. 3086, 3053, Insolvent Laws of Louisiana. And by the comity of States, our courts in a proper case would give effect to such laws and proceedings had under them.

We claim a reversal of the judgment of the Circuit Court for two reasons. 1. Because plaintiffs failed to prove before the court that their account was due when the suit was brought. 2. These defendants had obtained an order of judgment for a respite, restraining plaintiffs and another creditor from suing for a given time, not expired when this suit was commenced. For these reasons plaintiffs had no cause of action.

Brief of Elliott Henderson:

* * * We will now consider the action of this court in striking out the plea or affidavit of C. M. Rhodes filed upon the trial of this cause, in reply to the affidavit of defendants in error

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continue until such notice is given. Gulf, etc., R. R. Co. *v.* Horton, 84 Miss. 490.

2.

The sole object of this statute is to dispense with proof of the correctness of an account sued on, except when defendant, by his counter-affidavit, denies it. Its only effect is to make the account to some extent an account stated. Bower *v.* Henshaw, 53 Miss. 345.

The statute furnishes a rule of evidence and not of pleading. It makes plaintiff's affidavit as to the correctness of an open account, when read at the trial, *prima facie* true. The counter-affidavit destroys such presumption, and puts plaintiff to proof of the correctness of the account. Reinhardt *v.* Carter, 49 Miss. 315.

A counter-affidavit does not preclude the interposition of an affirmative defense in confession and avoidance. The statute provides a rule of evidence merely, and not of pleading. Aaron *v.* Podesta, 60 Miss. 82.

Where, without specification of items, there is in the counter-affidavit a general denial of the correctness of a sworn account sued upon, the defendant will not be permitted to controvert particular items, but only the general fact that he is chargeable as debtor. Tichenor *v.* Wheel Co., 54 Miss. 589.

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to the open account sued on. Section 1627, Revised Code of 1880, entitled a party making proper affidavit to his account to judgment at the trial term of the suit, unless defendant shall make affidavit and file with his plea that the account is not correct, particularizing wherein it is not correct. This plaintiff in error persistently refused to do in the justice court and the Circuit Court. They could not make such an affidavit without committing perjury, for in the testimony of Charles M. Rhodes, he admitted that the account sued on was due and owing, nothing having been said about the *time* of payment, and was correct and unpaid. The plea sought to be interposed was dilatory and should have been stricken out. Code 1880, § 1568.

The judgment of the court below has done complete justice between the parties to this suit, and we are satisfied that it should not be disturbed for any technical error that may appear upon the record.

COOPER, J., delivered the opinion of the court.

On the 28th day of March, the appellees brought suit on an open account against the appellants before a justice of the peace and filed their account that day. On the 4th of April, and before the return day of the writ, the plaintiffs filed another account, sworn to under the provisions of section 1627 of the Code. On the 14th day of April, the defendants filed their counter-affidavit in which, while not denying the correctness of the items of the account, they did deny the fact that the account was due on the day suit was instituted. The trial before the magistrate resulted in a judgment for the plaintiff from which the defendant appealed to the Circuit Court, where the case was tried before the judge, and again resulted in a judgment for the plaintiff.

On the trial of the case the plaintiff read his account and the affidavit thereto attached and rested, whereupon the defendants introduced their counter-affidavit and also one of the defendants, who testified that he had bought many thousand dollars of goods from the plaintiffs, and that they were always sold to him on sixty days time; that though nothing was said at the time of the purchase of the goods sued for he supposed the sale was on the usual time and not for cash. Other evidence was offered by defendant which was rejected by the court. The principal argument here has been as to the correctness of the ruling of the

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court upon this excluded testimony. In our view, this becomes immaterial since the facts proved did not warrant judgment.

The affidavit of the plaintiffs to their account was not filed with the account when the suit was brought, but the defendant waived objection to this irregularity and filed a counter-affidavit by which they denied a material matter, to wit: that the account was due and payable. This put the burden of establishing this fact on the plaintiffs. They offered no proof whatever to overcome the affidavit of the defendants, and if the defendants had not introduced Mr. Rhodes as a witness the plaintiffs would have had no evidence whatever to sustain their suit. But on the testimony of Rhodes we think the judgment wrong. Where parties deal together in many transactions in a certain manner it is to be inferred that their dealings are to be governed by the custom unless something to the contrary is shown. If the plaintiffs had sold many goods to the defendants, and the invariable rule had been that the sales were on sixty days time, then the defendants in making the purchase of the goods sued for would reasonably infer that they were sold on the usual time, and if the plaintiffs did not so intend to sell they should have given them some notice of that fact. Failing to do this, the debt would be due not on delivery of the goods, but only at the expiration of the usual time on which the sales had previously been made.

Judgment reversed.

W. M. BENNETT *et al. v.* C. A. ROWLAND *et al.*

Validity of Deed of Trust on Homestead not Signed by Wife of the Grantor — Subsequent Signing by Wife after Bona Fide Purchase for Value.

A deed of trust executed by the owner of a homestead not signed by his wife is invalid and the subsequent signing of same by the wife, after a bill has been filed in chancery against the grantor to enforce a lien for balance of purchase money by the holder of the purchase-money notes, does not validate the deed of trust as against the complainant in the bill and does not make the grantee in the deed of trust a *bona fide* purchaser for value.[1]

1

Contemporaneous assent of husband and wife, if living together, is essential to an incumbrance of the exempt homestead under Code 1880, § 1258. A trust deed thereon by the husband alone, though he owns the property, is void and will not be validated by a subsequent conveyance from the wife to the creditor.

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Statement of the Case.

Equities Between Codefendants — When Same Cannot be Adjusted Without a Cross-Bill.

The equities between codefendants may be adjusted without a cross-bill by one against the other in certain states of case, but where the claim of one codefendant against another does not result from the recovery of the demand of the complaint, against one or both, the right of one codefendant to a decree against his codefendant in that suit cannot be justified.[2]

Appellees, C. A. Rowland and W. A. Hobson, as administrators of the estate of A. B. Hobson, filed the bill in this case in the

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What would be the effect of such separate conveyance if made by direction or consent of the husband is not decided. Duncan *v.* Moore, 67 Miss. 136, 7 So. 221.

A conveyance of his homestead by a husband, without his wife's joinder, does not pass an estate in expectancy to vest when the land ceases to be a homestead. It conveys no estate whatever. McKenzie *v.* Shows, 70 Miss. 388, 12 So. 336.

A trust deed on his homestead, executed by a husband, void because of the nonjoinder of the wife, is not validated by their subsequent removal from the premises, whether such removal be temporary or permanent. The validity of the deed is determinable by the conditions existing when it was executed. Cummings *v.* Busby, 62 Miss. 195.

The act of 1873 (Laws, p. 78), providing that no conveyance of a homestead by the husband shall be valid unless the wife joins, confers no right of property upon the wife, but gives her merely a veto power. Billingsley *v.* Niblitt, 56 Miss. 537; Smith *v.* Scherck, 60 Miss. 491; Massey *v.* Womble, 69 Miss. 347, 11 So. 188; Pounds *v.* Clarke, 70 Miss. 263, 14 So. 22.

Uunder § 1893, Code 1892, declaring invalid conveyances of the homestead, "unless signed by the wife of the owner, if he be married and living with his wife," a husband who has driven his wife from his home and refuses to permit her to return, cannot lawfully convey the premises to a third person, the wife not joining in the conveyance. Scott *v.* Scott, 73 Miss. 575, 19 So. 589.

Where a wife joins her husband in a trust deed on the homestead to secure his debt due, a new promise in writing by him alone, before the bar of the Statute of Limitations has attached, keeps alive both the debt and the trust deed; joinder of the wife in the new promise is not required. Smith *v.* Scherck, 60 Miss. 491.

The owner of a homestead, who, to secure a debt he owes, has given a trust deed thereon which is void because not signed by his wife, cannot in equity, have cancellation without offering to pay the debt. Duncan *v.* Moore, 67 Miss. 136, 7 So. 221.

A conveyance or incumbrance by the husband of the homestead without the wife joining in the deed is not valid. Rights to a homestead are not dependent upon mistaken or false statements made by the husband, but upon the fact of his being the head of the family, and residing upon the premises as a home. Hinds *v.* Morgan, 75 Miss. 509, 23 So. 35.

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Chancery Court of Tippah county against W. M. Bennett to enforce an equitable lien on certain lands described in the bill for balance of unpaid purchase money. The land was sold to Bennett by one Whitenor on October 15, 1880, the deed from Whitenor recited that "for and in consideration of $500, the receipt of which is hereby acknowledged," etc. This bill was filed February 8, 1883. At the May, 1883, term of the Chancery Court, R. J. Thurmond was permitted, on his own application, to defend. August 11, 1883, Thurmond filed his answer claiming title to the land by virtue of a deed of trust to secure a debt

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The wife has a mere veto power on the sale of a homestead and not a property right subject to bargain and sale, and a promise made by the husband to the wife to secure her signature is void. Gatti v. Supply Co., 77 Miss. 754, 27 So. 601.

Although the husband forges his wife's name to the mortgage on land including the homestead, to secure borrowed money (the mortgagee being innocent), a part of the money is issued to pay off the purchase-money debt secured by a vendor's lien on the whole land, the mortgagee, who takes up the note for the purchase-money debt will be subrogated to the right of the holder of the purchase-money lien as against the homestead. Trust Co. v. Lanier, 78 Miss. 418, 28 So. 804.

A deed executed by the husband living with his wife purporting to convey his homestead is not good to convey any interest whatever therein unless it be signed by the wife. Hence, the vendee in a deed from a husband living with his wife which she did not sign, purporting to convey his homestead, cannot maintain ejectment for the lands after the death of the husband against those who claim under his heirs. Johnson v. Hunt, 79 Miss. 639, 31 So. 205.

A deed from a husband to his homestead, although void from the want of his wife's joinder therein, is good against third party as color of title to sustain a claim by adverse possession. Johnson v. Hunt, 79 Miss. 639, 31 So. 205.

Where a wife does not sign the mortgage on the homestead, executed by the husband, her subsequent conveyance of her interest therein to the mortgagee, without her husband's consent, imparts no validity to the mortgage. Duncan v. Moore, 7 So. 221.

2.

It is settled that the defendant cannot pray anything in his answer, except to be dismissed with his costs. If he seeks to obtain a discovery of facts necessary to his defense, or to obtain any relief, he must resort to a cross-bill. Millsaps v. Pfeiffer, 44 Miss. 805.

A decree granting relief in favor of a defendant against the complainant cannot be granted except upon a cross-bill filed by the defendant. Arnold v. Miller, 4 Cush. 152.

Where a cross-bill seeks not only discovery but relief, the relief should be equitable, otherwise the cross-bill is demurrable. Gilmer v. Felhour, 45 Miss. 627; Thomason v. Neely, 50 Miss. 310; Buckingham v. Wesson, 54 Miss. 526.

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due by Bennett to him. He did not make his answer a cross-bill against Bennett and asked for no relief against him. The deed of trust was made an exhibit to his bill and was signed by W. M. Bennett only. It was dated December 14, 1882. On October 30, 1883, the deed of trust to Thurmond was signed and acknowledged by Mrs. F. P. Bennett, wife of W. M. Bennett, and it was filed for record after the bill had been filed but before final decree was rendered. The proof showed that at the time the deed of trust was executed to Thurmond, W. M. Bennett was married and living on the land as his homestead.

From a decree granting the relief sought by complainants, directing the land to be sold to pay the balance of the purchase money due on the land and directing that if any surplus was left after paying the debt it should be paid to Bennett, Thurmond appeals.

APPEALED from the Chancery Court of Tippah county, A. B. FLY, Chancellor.

Affirmed, January 28, 1884.

Attorneys for appellant, C. M. Thurmond, Jno. W. C. Watson.

Attorneys for appellees, Falkner & Frederick.

A cross-bill setting up a matter purely defensive and fully asserted in the answer is demurrable. Buckingham *v.* Wesson, 54 Miss. 526.

As against the complainant in the original bill a complainant in a cross-bill is not required to show any ground of equity jurisdiction to support his bill, it being a mere auxiliary. Thomason *v.* Neely, 50 Miss. 310.

Although it may be improper to permit a cross-bill as against a codefendant because of a mere prospective danger of injury, still, in granting relief on the original bill, the court should enforce, as far as practicable, the equities of all the parties. Brooks *v.* Kelly, 63 Miss. 616.

Where a cross-bill is filed by a defendant in an equity suit against a codefendant, not involving the controversy between the complainant in the original bill and the defendants thereto, a decree in such complainant's favor does not affect the rights propounded by one defendant against another in the cross-bill. Jackson *v.* Lemler, 83 Miss. 37, 35 So. 306.

A decree in favor of complainant against several defendants does not render the relative rights and liabilities of defendants as between themselves *res judicata*, when such rights are not involved in the determination of the complainant's claim. Jackson *v.* Lemler, 83 Miss. 37, 35 So. 306.

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Brief of C. M. Thurmond:

We, for appellant, respectfully submit that the court below erred in that it did not sustain appellant Bennett's demurrer for that the bill was incomplete in that it did not allege the time when appellees were appointed as administrators of the estate of A. B. Hobson, deceased, but says on the —— day of ——, 18—. This is, we think, a fatal defect in the bill.

"The allegations in a bill must be certain, particular, and distinct." Smith *v.* Gill, 52 Miss. 607.

Also "A bill which does not set out the complainant's case in plain, positive, and perspicuous language is bad on demurrer." Perkins *v.* Sanders, 56 Miss.

The court erred in not sustaining the demurrer because it is not shown that any bond was ever given for the faithful application of the proceeds of said estate by the said administrators. As far as the bill shows no bond was ever given in accordance with the requirements of section 1995, Code 1880.

The court erred in admitting incompetent and irrelevant testimony, in that it admitted testimony tending to show that Bennett was at the time of the execution of the trust deed, a married man, and used the said land for a homestead. This was an error, for appellee's bill nowhere and at no place states this to be a fact, and a complainant cannot rely on any fact or circumstance not set out in his bill. George's Digest, p. 897, § 510.

The *allegata* and *probata* must correspond. Carnes *v.* Hubbard, 2 S. & M. 108, 41 Miss. 533–4.

Allegata and *probata* must correspond. Evidence which does not correspond with the pleadings is *irrelevant.* Cole *v.* Hundley, 8 S. & M. 473.

No proof that the land in question was a homestead is admissible. Complainant can have no relief except as his case is made out by the bill, and defendant Thurmond will not be compelled to meet a case made by the proof but not stated in the bill. George's Digest, p. 863, § 204, and cases there cited.

"It is a principal equity pleading that a party cannot be permitted at the hearing to show a title different from that set up in his bill, nor can proof be offered or relief granted upon facts not stated in the bill." Kidd *v.* Manly, 6 Cush. 156.

The court erred in granting a decree against Thurmond, for he had the legal title to the land and his equity was equal if not

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superior to the appellees as administrators of the assignee of the note. Let us see. Whitenor sold land to Bennett, executing the deed therefor, and making this recital in it, "for and in consideration of five hundred dollars, the receipt of which is hereby acknowledged," etc. In Parkers *v.* Fay & Fowler, 43 Miss. 260, it is said that recitals like the above are only *prima facie* evidence of actual payment, and is not absolute estoppel to a denial of the recital. Gordon *v.* Manning, 44 Miss. 756.

But in the later case of Mairs *v.* Bank of Oxford, 58 Miss. 913, the court lay down this as the unquestionable law: "In the deed of conveyance from Mairs and wife to Elliott there was an acknowledgment made of payment. A subsequent purchaser therefore, would, so far as that deed was concerned take the land freed of the equitable lien of the vendor." 58 Miss. 923. It will be seen by note to this on page 919 that Judge Simrall concurred in this view, though he had delivered the opinion in Parkers *v.* Fay & Flowers, in 43 Miss. 260.

Thurmond, on this recital in the deed to Bennett, and having no knowledge that there was any vendor's lien on any land, advanced money to him; this created a perfect equity in his behalf, one too of which the Whitenors by their voluntary act were the authors, then Thurmond's equity is fully equal if not superior to Whitenors or his assignee, and should prevail for equity. It was the right of Bennett and wife to protect Thurmond by acquiring the legal title and this they have done, by giving to Thurmond a trust deed on the land. True, Mrs. Bennett did not sign the trust the day it was given, but it was done afterward and thereby perfected.

Appellees rely upon section 1258, Code 1880, to sustain the action of the lower courts. They contend that the trust deed to C. M. Thurmond as trustee was void because not signed at the time by Mrs. Bennett. We say in reply, that Mrs. Bennett did sign it in time, and if she did not no proof could be introduced to show that it was a homestead. Further, they are *estopped* from saying that the purchase money is unpaid, for under Mairs *v.* Bank of Oxford, 58 Miss. 913, their assignor was estopped from denying it, and of course this assignee would also be. Further we say, that section 1258, Code 1880, was made especially for the protection of the wife or her immediate heirs, and that either she or they are the only ones who can take any advantage of her non-

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joinder in the trust deed if such was the case. The section is, "No mortgage or deed of trust or other incumbrance upon the homestead, exempted from execution, shall be valid or binding unless signed by the wife," etc., manifestly meaning that it is for the benefit of the wife. 'Tis true that it is void if she so desires, but we think it is as clearly true that she has the right to ratify and sign it; this the wife has done in this case.

The case of Howell and Wife *v.* Bush, 54 Miss. 437, relied upon by appellees is not analogous, for there the wife refused to join in the trust and afterward filed a bill to enjoin the trustee from selling. Such is not the case here. Mrs. Bennett has signed the trust and it is upon record. She is not the party that is trying to take advantage of the law, but it is an outsider, one whose assignors under 58 Miss. could not have taken advantage of it in as much as he would have been estopped from denying that he had received full pay for the land. Equity trys to get at the *right* and *justice* of the case and will overlook the form in order to do it. Justice and right is certainly on the side of appellant Thurmond, for upon the deed as executed and delivered by Whitenor, appellees' assignor, he has parted with his money. They lose nothing, he, his $378.50.

The trust deed was not invalid because of the nonjoinder of the wife, if she had not joined. Billingsley *v.* Niblett, 56 Miss. 537–540.

Brief of J. W. C. Watson:

Thurmond is a *bona fide* purchaser for value without notice. He denies notice in his answer and disproves it as a witness, and there is no testimony tending to show notice on his part.

Bennett owed him a debt. He took a new note for the amount, extending the time of payment and advancing an additional sum of money which was included in the note. This extension of time and cash advanced in good faith, certainly made Thurmond a *bona fide* purchaser. At least as to the cash advanced there can be no question on this point.

Furthermore, the recitals in Bennett's deed shows a waiver by his vendor of any right or claim to a lien for unpaid purchase money. This deed recites that it is made "in consideration of the sum of $500 in hand paid the parties of the first part, the receipt of which is hereby acknowledged," etc. In the face of

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this recital the equity of Thurmond is certainly as great as that of the complainants. The equity is equal between persons who have been equally innocent and equally diligent. 1 Story Equity, § 64c.

The deed of trust given to Thurmond by W. M. Bennett is *void,* not being signed by the wife. Howell *v.* Bush, 54 Miss. 437.

If the deed of trust under which Thurmond claims is *void,* then he has no right to interfere with complainant's suit to enforce their lien for the unpaid purchase money. He has no *locus standi* in court. Appellees being assignees of the note for the purchase money can enforce the vendor's lien as the vendor could. See last clause of section 1124, Code of 1880.

Therefore, we think the decree of the chancellor is right, and should be sustained.

Thurmond is also clothed with the legal title to the land, or at least his trustee is. The signing of Bennett's deed of trust by his wife certainly perfected the title to the land in the trustee, and Thurmond had a right to acquire this legal title to perfect his previous equitable title. 1 Story Equity, § 64c.

Whilst the Act of 1873 required the wife to join in the conveyance, the Code of 1880 only required of the wife to sign the deed of her husband. Act of 1873, p. 78; Code of 1880, § 1258.

Moreover, that Bennett was a married man is not so much as stated in the pleadings in the bill, and the fact, therefore, is wholly unavailing to complainants.

But conceding all that complainants can claim, after the payment of their debt, Thurmond's debt should have been held a charge upon the land, but the decree disallows his debt, and directs that if any surplus is left after paying the debt of complainant, that such surplus be paid only to Bennett. This is clearly error.

Brief of Falkner & Frederick:

Appellees, who were complainants in the court below, filed their bill on the 8th day of February, 1883, against W. M. Bennett, to enforce their equitable lien on the land in controversy for the balance of the unpaid purchase money. The cause was heard on demurrer of Bennett at the May term of the Chancery Court, 1883, when the court overruled the demurrer and gave

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defendant leave to answer. At May term, 1883, R. J. Thurmond was allowed to be made a party defendant to the bill. On the 11th day of August, 1883, R. J. Thurmond filed his answer to the bill, claiming title to the land by virtue of a deed of trust to C. M. Thurmond, trustee, to the land in controversy, to secure certain indebtedness from Bennett to him. Thurmond makes this deed of trust an exhibit to his answer. This deed of trust was signed by W. M. Bennett only, and with such signature only it was filed for record on the 14th of December, 1882. On the 30th day of October, 1883, a deed of trust was acknowledged by F. P. Bennett, wife of W. M. Bennett, and with the signature and acknowledgment of W. M. Bennett and wife, was filed for record on the 12th day of November, 1883. The deeds of trust describe a note executed by W. M. Bennett and the note filed as an exhibit is the note of W. M. Bennett and *M. J. Bennett.*

The deed from Whitenor and wife to W. M. Bennett was executed the 19th of October, 1880, but was not filed for record till the 14th day of December, 1882, and was recorded on the 25th day of January, 1883.

The deed of trust was executed by W. M. Bennett only on same day deed from Whitenor to Bennett was filed for record. The deed of trust was placed upon record on 14th of December, 1882, and the deed recorded 25th of January, 1883.

W. M. Bennett, the grantor in the deed of trust to C. M. Thurmond, was a married man and a householder and lived on the land as a homestead at the time he executed the deed of trust to Thurmond. Briefly the facts of the case are these: Complainants, on the 8th of February, 1883, filed their bill to enforce vendor's lien on the land. At that date the deed of trust signed by W. M. Bennett only was upon record. On 11th day of August, 1883, Thurmond filed his answer. On 30th of October following, the wife of W. M. Bennett signed and acknowledged another deed of trust and this other deed of trust was filed for record on the 1st of November, 1883, and recorded on the 12th of November, 1883. The first deed of trust is made an exhibit to Thurmond's answer. W. M. Bennett was a married man and lived on the land as a homestead at the time this first deed of trust was given.

"No mortgage, deed of trust, or other incumbrance upon the homestead, exempted from execution, shall be *valid* or *binding,*

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unless signed by the wife of the owner if he is married and living with his wife." Code 1880, § 1258.

OPINION.— CAMPBELL, C. J., delivered the opinion of the court.

The insuperable difficulty in the way of Mr. Thurmond in maintaining his defense is that the deed of trust executed by Bennett and on which Thurmond's claim as a *bona fide* purchaser rests, was not valid because not signed by Bennett's wife, and the subsequent signing of the deed by her, after the institution of this suit, did not have the effect to validate the incumbrance as against the complainants in the bill. Until signed by the wife the deed was not valid. When it was signed by her the suit was pending, and the right of Thurmond is subordinate to that of the complainants.

There could not be a decree in favor of Thurmond for any excess arising from the sale of the land after paying complainants, because his answer was merely defensive to the bill, and was not made a cross-bill against his codefendant, Bennett, who had no opportunity to contest with him as to the deed of trust. If the bill had set forth the claim of Thurmond by virtue of the deed of trust, so that a decree between the defendants "grounded upon the pleadings and proofs between the complainants and the defendants" might be made, it might have been proper to have considered the right of Thurmond as against Bennett, "but where the claim of one codefendant against another does not result from the recovery of the demand of the complainant against one or both * * * the right of one codefendant to a decree against his codefendant in that suit," cannot be justified. Arnold *v.* Miller, 26 Miss. 152.

The equities between codefendants may be adjusted without a cross-bill by one against the other in certain kinds of cases, but this is not one in which a decree between the codefendants would be proper. As the claim of Thurmond is not set forth in the bill, and he did not make Bennett a defendant to his assertion of right under the trust deed, no opportunity was afforded for any contest by Bennett with respect to the trust deed, and the chancellor did right not to make a decree as between the codefendants. We find no error in the decree, and it is, therefore, *affirmed.*

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R. E. PALMER *et al.* *v.* M. P. LOWERY.

Trust Estate — Not Chargeable with the Personal Debts of the Trustee.

The mere fact that the father, who holds an estate, as trustee, for the benefit of his children, to be appropriated to their maintenance and education, has incurred a debt for the education of one of the beneficiaries, is insufficient to establish a charge of the trust estate.

R. Palmer executed a deed to appellant, R. E. Palmer, as trustee, for the benefit of his children: "To hold during his natural life for the benefit of his natural heirs * * * giving the said R. E. Palmer the right to cultivate, lease, or sell the same as the interest of his said heirs may require in the opinion of said R. E. Palmer and the proceeds arising from such cultivation, leasing, or sale shall be applied by him to the support, maintenance, and education of his said heirs."

R. E. Palmer had several children and sent his eldest daughter to the school of appellee Lowery, and only paid part of her board and tuition, and after the session was over he gave his note to Lowery for the balance. The note was not paid when it fell due and Lowery filed the bill in this case in the Chancery Court of Tippah county against R. E. Palmer and his children, seeking to fix the balance due on the note as a charge on the trust estate. From a decree granting the relief sought and subjecting the *corpus* of the estate to the payment of the note this appeal was taken by the defendants.

1.

A court of equity in determining upon an application to order a sale of the corpus of a trust estate, which the trustee is authorized in his discretion to appropriate to the maintenance and support of the beneficiaries, will look with favor upon the claims of those who have supplied the beneficiaries with necessaries which could not be procured by the proceeds of the estate; but it will refuse its aid to secure enforcement of improvident contracts and extravagant purchases made by the *cestui que trust*, even if they were sanctioned by the trustee. Prewett *v.* Land, 36 Miss. 495.

While, ordinarily, the contracts of a guardian or other trustee bind him personally and not the estate he represents, one whose money has discharged debts against a trust estate, which it is bound to pay, will, in equity, be substituted to the rights of the holder of such debts, but the right cannot be enforced by action at law. Hines *v.* Potts, 56 Miss. 346.

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APPEALED from Chancery Court, Tippah county, A. B. FLY, Chancellor.

Reversed and remanded, January 28, 1884.

Attorneys for appellant, W. A. Crum and Watson & Thurmond.

Attorney for appellee, Thos. Spight.

Brief of Watson & Thurmond:

The appellant, R. E. Palmer, sent his eldest daughter to appellee's school; some time after the close of the session the appellant gave his note to appellee for the balance due for board and tuition; on this note a payment of $50 was made by appellant.

Such being the facts, appellee filed his bill asking that the balance due on said note be made a charge on a certain tract of land, which had been conveyed to said R. E. Palmer in trust for the "support, maintenance, and education" of his children.

The contract on the part of Palmer for the board and tuition of his daughter was a purely personal one. It is the duty of the father to educate his child, even though the child may have property in his or her own right, and until the contrary is shown, the father will be held personally bound for the board and tuition of his child. The proof of both Lowery and Palmer is that no reference was ever made to trust property held by Palmer for his children until after Palmer had given his note in the premises. That Palmer was personally bound for this debt is undisputed, and there is no evidence tending to prove that when the contract for the board and tuition of Palmer's daughter was made, either Lowery or Palmer was looking to the trust property.

The attention of the court is specially called to the brief of our associate counsel, Mr. Crum.

Brief of W. A. Crum:

The demurrer should have been sustained. Granting all that is claimed upon the face of the bill, there is no equitable claim therein shown as against the trust estate and the beneficiaries thereunder. No credit was extended either to the trustee nor the beneficiary, Ossie, upon the faith of the trust property, nor was it in any way benefited by the service performed by com-

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plainant in the bill; but, conceding that a credit was given upon the faith of the trust estate, and a lien thereby created, "the moment complainant took the trustee's note bearing interest for the money, it was, as to the trust estate, a complete payment." Pettibone *v.* James, 3 Cush. 500. * * *

The bill shows that her father is "wholly insolvent," and that there is a *small* estate held in trust, for the "support, maintenance, and education" of *seven* beneficiaries. In this view of the case, the court could not, "having regard for their future situation, prospects, and destination," make the education of one of the beneficiaries a charge against the trust estate, to the injury, perhaps total destruction of the rights of all the other beneficiaries. Code 1880, § 2109.

This is what this bill proposes to do. It discloses the insolvency of the father, the existence of a small estate, does not disclose the probable value, may, or may not, be sufficient even by a sale of the *corpus* of the estate to pay the demand of the complainant, shows that there are six other beneficiaries under the trust, all minors, who are to be "supported, maintained, and educated by the fund arising from the cultivation, leasing, or sale of the trust estate," and yet asks the court to ignore the existence of all the *cestuis que trustent* save one, and apply the whole, if so much be necessary, to pay the charges of the president of Blue Mountain Female College, against *one* to secure the payment of an alleged debt *improvidently and unnecessarily* incurred. * * *

Let us suppose that R. E. Palmer, the trustee, had sold the land, as under the deed he had the power to do, and had given the whole of it, or attempted to give the whole of it to the "support, maintenance, and education" of his daughter Ossie. Will any one pretend that this would not be a breach of the trust committed to him, and would not a court of equity lend its aid in behalf of the other six children? Yet this is just what this bill seeks to do.

The Chancery Court had no jurisdiction, it being the individual contract of R. E. Palmer. * * *

Such contracts or engagements can give the court no jurisdiction to render a decree against him. Prewitt *v.* Land, 36 Miss. 509.

The demand is purely a legal demand, having no more equity

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than any other legal demand. Hence, admitting the trust estate in the hands of R. E. Palmer to be equitable assets, in order to reach these assets the creditor must have reduced his demand to a judgment at law, else he could not invoke the aid of a Court of Chancery. Farned *v.* Harris, 11 S. & M. 371. * * *

But suppose the parties are without remedy at law. They must show, first, that there are now, or were, at the time of filing the bill "proceeds," arising "from the cultivation, leasing, or sale of the land" in the hands of R. E. Palmer, else no decree could be rendered. No such showing is made by the bill.

Second. "In presenting themselves here, they must show a case in which it would have been the *duty* of the trustee to sell the property" (for the benefit of the child, Ossie? No. But) "*for the benefit of all* the children. They cannot ask a court of equity to do what the trustee rightly refused to do. What necessity is shown to have existed? Prewitt *v.* Land, 36 Miss. 508. * * *

Failing to disclose any "proceeds" in the hands of the trustee, the bill was defective — fatally so — and the demurrer should have been sustained and bill dismissed.

In no event could the trustee, by his personal contract, charge the trust estate. Persons who deal with the trustees do so at their own peril. Vernon *v.* Board of Police, 47 Miss. 181; Dizier *v.* Freeman, 47 Miss. 647.

Contracts of trustees bind only themselves. Hines *v.* Potts, 56 Miss. 346.

An agent employed by a trustee has no lien upon the trust estate. Fearn *v.* Mayers, 53 Miss. 465.

For what was this trust executed? To "support, maintain, and educate" the beneficiaries. Now, can it be claimed that Lowry, the complainant in the court below was anything more than the agent of the trustee? I think not. * * *

While trustees have a lien on the trust fund for all costs legitimately incurred by them in its administration, this privilege does not extend to agents employed by them, but such agents must look alone to the trustee for their reimbursement. Hill on Trustees, 567; 2 Perry on Trusts (2d ed.), § 907; Jones *v.* Lawson, 19 Ala. 672.

On this point I also cite Clopton *v.* Gholson, 53 Miss. 471, and cases there cited as conclusive of this matter.

Norton *v.* Phelps, 54 Miss., may be cited and relied upon by counsel, but the principle there announced can have no applica-

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tion here; for in that case there had been advancements or expenditures *for the benefit of the trust estate.* This court, after citing and reaffirming the case of Clopton *v.* Gholson, *supra,* say: "But while this is the rule, there are exceptions to it, and where expenditures have been made for the benefit of the trust estate, *and* (not or) it has not paid for them, directly or indirectly," then there is a relaxation of the general rule. Certainly it will not be claimed that appellee Lowry, has made any expenditures for the benefit of the trust estate, and if he has not, or if the bill does not show such to be the case, he can claim no exemptions from the general rule. No such thing is charged.

"In granting a decree for the sale of the *corpus* of the trust estate" there is not only no equity; but is in the face of all equity. "Equity in its true and genuine meaning, is the soul and spirit of all law; positive law is construed and rational law made by it. It is synonymous with justice; in that, to the true and sound interpretation of the rule." Story Equity Jurisprudence, § 6.

Thus defined, let us apply it to this case as made by complainant's bill. Here is a trust estate for the equal benefit of seven children. One of them contracts (*pro forma*) a liability, which in no manner nor degree inures to the benefit of the estate, nor to the benefit of either of the other six beneficiaries of the trust. Is it "justice" to the other six beneficiaries that the reckless and extravagant conduct of the one shall deprive them of all beneficial interest in the trust estate? * * *

Brief of Thos. Spight:

R. Palmer executed a deed to R. E. Palmer in trust for the benefit of the children of trustee, with power to sell, lease, or cultivate the land and defray expenses for the support and education of children.

One of the children of R. E. Palmer, and beneficiary in this trust, procured board, tuition, etc., with appellee, which is admitted to be due and unpaid.

The trustee was wholly insolvent and credit given on faith of trust estate.

Decree for appellee, subjecting *corpus* of the estate to be paid 1st December, 1883.

The power under which trustee is acting does not provide that

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an equal distribution of the fund shall be made, but that the *corpus* and income of the estate should be employed for the support, maintenance, and education of all the heirs of the trustee.

I shall content myself with simply referring to authorities in support of my theory of the case without argument *in extenso,* and cite the court to the following, viz.: 2 Story's Equity Jurisprudence, 964; 36 Miss. 495–508; 53 Miss. 472–474; 54 Miss. 471, 359; 27 Miss. 119.

The decree is only for a small balance, and Palmer being wholly insolvent and the proceeds of cultivation of the land being so incumbered from year to year as to be beyond the reach of creditors, the only remedy of Lowry is against the land itself, which is clearly subject to it. 36 Miss. 495 is conclusive in this case.

OPINION.—COOPER, J., delivered the opinion of the court.

Though the father was trustee of an estate for the benefit of his children, the income and profits of which, and in the discretion of the trustee, the *corpus* itself were to be appropriated to the maintenance and education of the beneficiaries, it was nevertheless permitted to the father to devote his own estate or credit to the same purposes.

The mere fact that the appellee has a debt against the father for the education of one of the beneficiaries of the trust fund is insufficient to establish a charge on the trust estate.

This is all that is shown by the evidence in the cause, and the decree is *reversed.*

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J. B. MORTIMER, Trustee, v. JOHN A. MCKAY.

Appropriation of Payments — When Note and Deed of Trust Extinguished.

When a note is given for a debt thereafter to be incurred for advances and a deed of trust is given to secure same and supplies are afterward advanced and charged on the books of the grantee to a greater amount than the face of the note so secured and charged on the books of the grantee, and the grantor afterward ships cotton to the grantee without directions as to how the proceeds are to be appropriated and the grantor is given credit for the proceeds on the account on the books of the grantee this will be held to be an appropriation of the payment to the first items of the account and an extinguishment of the mortgage debt to that extent.[1]

Same — On Open Account.

Where a credit upon an open account is not applied by either party the law appropriates it to the oldest items.

Replevin by appellant against appellee to recover possession of three bales of cotton. From verdict and judgment for defendant plaintiff appeals.

1.

The debtor has the right at the time he makes a payment to appropriate it to whichever of several demands held against him by the creditor he pleases; if he fail to exercise this right, then the creditor can appropriate the payment. Crisler *v.* McCoy, 33 Miss. 445.

Where several promissory notes being for several installments of one debt are given on the same day, but falling due at different times, partial payments thereon, unappropriated, by the parties, will be applied exclusively to the note first falling due, until it is satisfied, and then to the next, etc. Miller *v.* Leflore, 32 Miss. 634.

Partial payments on an open account, if unappropriated by the parties, will be applied to the items drawing interest in the order in which they fall due. Scott *v.* Cleveland, 33 Miss. 447.

Partial payments are applied to a debt overdue in preference to one not due when they are made. Effinger *v.* Henderson, 33 Miss. 449.

If a party be indebted by mortgage and also by simple contract debts to the same creditor, and make a payment and omit to apply it specifically to one of the debts, the law will make the application in the way most beneficial to the debtor, viz.: to the mortgage. And so if the mortgagor sell the mortgaged property, and the purchaser pay the purchase money to the mortgagee, who has another debt against the mortgagor, the law will apply the payments made by the purchaser in exoneration of the mortgaged property. Poindexter *v.* La Roche, 7 S. & M. 699.

A party indebted on several accounts may, on making a payment, direct its appropriation. Champenois *v.* Fort, 45 Miss. 355.

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Statement of the Case.

T. H. Lake, a commission merchant, agreed to furnish John A. Cameron money and supplies for the year 1876 to the amount of $400, and in February, 1876, John A. Cameron and his wife executed their joint note to Lake for $400 for advances thereafter to be made. At the same time they executed a deed of trust to secure the note on some land that belonged to Mrs. Cameron and the crops to grow thereon for that year.

Lake afterward formed a partnership with one Marshall and the firm name of Lake & Marshall and that firm furnished to Cameron money and groceries to the amount of $750, all of it being charged on the books of Lake & Marshall, but with the understanding between them that Lake was to own the note and account. In Octo-

In this State, the rule of the civil law which, in the absence of any appropriation by either debtor or creditor, appropriates payments most beneficially to the debtor obtains. McLaughlin *v.* Green, 48 Miss. 175.

Where a payment upon an open account is not applied by either party, the law appropriates it to the oldest items of the account, even though such items, if not so paid, would have been barred by limitation. Fletchaer *v.* Gillan, 62 Miss. 8.

The rule that a debtor making a voluntary payment may direct which of several debts the credit may be applied to, and if he gives no direction the creditor may make the application, and if both omit it the law will apply it, has no application where payment is enforced by process of law or *in invitum*. Wooten *v.* Buchanan, 49 Miss. 386.

Where there are several notes secured by a vendor's lien and all are due the money arising from the foreclosure should be applied ratably to the several notes, and this, although there has been a judgment at law upon one of them. Wooten *v.* Buchanan, 49 Miss. 386.

The law appropriates payments most beneficially to the debtor. If a mortgagor delivers the incumbered property to the mortgagee without direction the law will apply the same to the liquidation of the mortgage debt, and not to an unsecured claim. Neal *v.* Allison, 50 Miss. 175; Windsor *v.* Kennedy, 52 Miss. 164; Ogden *v.* Harrison, 56 Miss. 743.

And so, where a note secured by a crop mortgage is given for future advances, though the amount of the note is placed to the credit of the debtor on account, it cannot be claimed by the creditor, in order to control the application of payments made by the delivery of the mortgaged property, that the money placed to the credit of the debtor thereby became his, and, being all drawn out by him, the cotton afterward delivered was intended to be applied to the advances made after the amount credited to the debtor was drawn out, leaving the note and mortgage unpaid. Windsor *v.* Kennedy, 52 Miss. 164.

The rule that payments are to be applied most beneficially to the debtor cannot be invoked by a purchaser of mortgaged property in order to secure its release, where a subsequent partial payment is made by the mortgagor (not of property covered by the lien), which payment is, by consent, applied by the mortgagee to other indebtedness. Hiller *v.* Levy, 66 Miss. 30, 5 So. 226.

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ber, 1876, Cameron shipped eight bales of cotton to Lake & Marshall without directions as to how the proceeds should be applied. The cotton was sold by Lake & Marshall and the proceeds, amounting to $351.67, was placed to the credit of Cameron on the books of Lake & Marshall and appeared as a credit on the account on the books. Cameron afterward sent money which, added to this amount, was sufficient to pay the note and interest on it, with directions that it be credited on the note which was done. After this the Camerons gave another deed of trust on the crops in which appellee McKay was trustee. He took possession of the three bales of cotton in controversy when appellant, Mortimer, as trustee in the deed of trust to secure Lake & Marshall, sued out this writ of replevin for the cotton, claiming under that deed of trust. Lake and Marshall testified that the proceeds of the cotton just about paid the account and was not applied to the payment of the note but to the account with the consent of John A. Cameron. This was denied by Cameron.

APPEALED from Circuit Court, Lauderdale county, S. H. TERRAL, Judge.

Affirmed, November 12, 1883.

Attorneys for appellant, Dial & Witherspoon.

Attorneys for appellee, John W. Fewell.

Brief of Dial & Witherspoon:

* * * Defendant urges three objections against plaintiff's title: First, that the trust deed which is the basis of plaintiff's claim was satisfied in full prior to the institution of this suit. Second, that said trust deed was null and void because no trustee was named in it at the time of its delivery, and, third, that said trust deed does not cover the cotton in dispute. The first of these objections was sustained by the court below in refusing to give sixth, seventh, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth instructions asked by plaintiff, and in giving the third, fifth, sixth, seventh instructions asked by defendant, and the action of the court in refusing to give the former and in giving the latter constitute the first assignment of error.

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On the 1st day of October, 1876, J. A. Cameron shipped to Lake & Marshall, of Mobile, Ala., eight bales of cotton and at that time he owed Lake & Marshall a debt which the proceeds of said cotton was just sufficient to pay and the appropriation of said proceeds to the payment of their claim will leave the note and trust deed in dispute unsatisfied, so that the real question here is whether said proceeds must be applied to the claim of Lake & Marshall or to the note and trust deed of Lake. * * *

In refusing to give plaintiff's sixth instruction, which means that if Cameron owed Lake & Marshall a debt and paid them, they cannot receive said payment because at the time Cameron also owed a debt to T. H. Lake, we think there is error. It is true that Mr. Lake held a trust deed on the cotton with which Mr. Cameron sought to make the payment to Lake & Marshall and possibly this might have enabled Mr. Lake, in the first, to insist on an application of the eight bales of cotton to his note, but surely when Cameron shipped the cotton to Lake & Marshall and all parties agreed to apply it to the firm debt there is no law which prevents such application. The refusal of the court to grant the sixth instruction asked by plaintiff and all the instructions refused or given with regard to the appropriation of payments indicate a misconception of the case of Ogden *v.* Harrison, 56 Miss. 743. When cotton embraced in a trust deed is delivered to the grantee the law does not make the application of the payment, but according to this decision the mortgage itself is an express agreement, as to the appropriation and the parties can change that agreement, as any other contract, at their will. But the case of Ogden *v.* Harrison can have no application in this cause for the reason that the mortgaged property was never delivered to T. H. Lake, the beneficiary, but to a firm of which he was a member. But even if Cameron had owed both debts to Lake and had delivered the cotton to him, an express agreement could have changed the application agreed on the trust deed. In refusing to give plaintiff's seventh instruction, the error is equally manifest. A shipment of the eight bales to Lake & Marshall was an express agreement on Cameron's part that the proceeds should be applied to the payment of the firm debt.

The tenth instruction asked by plaintiff seeks to justify the application of the proceeds of the eight bales to the firm debt because at the time of its reception by Lake & Marshall they did

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not know that said cotton was embraced in Lake's trust deed. * * *

In refusing to grant the twelfth instruction asked by plaintiff the court below assumes that if Cameron owed both debts to T. H. Lake and shipped him the cotton embraced in his trust deed, then the law applies to proceeds of the mortgaged cotton to the mortgage debt absolutely, and that an agreement of the parties to the trust deed could not change that application. This instruction as asked was correct and should have been given.

The thirteenth instruction asked by plaintiff justifies the application of the eight bales of cotton to open account debt because at the time of shipment it was due and bearing interest while the note and trust deed did not fall due until nearly two months later. In the case of Ogden *v.* Harrison, both the unsecured debt and also the mortgaged debt to which latter this court decided to apply the proceeds of the mortgaged property, were due, and in that particular that case was different from the case at bar. In this case if Lake had received the cotton and had owned both claims it would have been his duty to apply the proceeds to the debt first due. The very time of payment is conclusive evidence of the debtor's intention to pay the debt that is due and the only one on which he could be sued while Lake could not be required to accept payment before maturity and tender before then would not be good. Bacon *v.* Brown, 1 Bibb, 334, 4 Am. Dec. 640 Miller *v.* LeFlore, 32 Miss. 634; Scott *v.* Cleveland, 33 Miss. 447; Effinger *v.* Henderson, 33 Miss. 449.

There being some little evidence to show that no application at all was made by the parties, while the great weight of the testimony showed such application, yet in case the jury should believe that there was no such application we asked the fourteenth instruction to the effect that in that case the law made the application to the debt overdue, and bearing interest, and it was error to refuse it. * * *

It is not only to the debtor's interest to pay a debt due rather than one not due, but in this case such payment was calculated to benefit the debtor in the accomplishment of a special object. 14 Am. Dec. 691, 12 Serg. & R. 301.

The principle of law laid down in this case is stated in the fifteenth instruction asked by plaintiff and the same should have been granted.

The third instruction asked by defendant and given by the court is clearly erroneous in three respects: First. It assumes as

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true that the eight bales of cotton were shipped to Lake while there is not a syllable of evidence to that effect. * * * Second. If the cotton had been shipped to Lake, still the law does not make the application but the agreement in the trust deed would direct and the jury should have been left free to decide whether that agreement had been changed by the parties as the evidence abundantly shows that it had. Third. This instruction goes on to reduce the whole case to a simple example of arithmetical addition and tells the jury to find for the defendant if the sum of $354.95 and $45.05 is equal to $400, the face of the note. * * *

The fifth instruction given to the defendant is erroneous in three respects: First. The court tells the jury that the account dated November 28, 1876, does not show any application of the proceeds of the eight bales. An inspection of the account shows that it consists of two parts. First, of Cameron's account with T. H. Lake running from February 29, 1876, to June 28th following and making Lake's claim $632.58. The first part closes with the statement "Bal. due T. H. Lake Nov. 28th, 1876, $632.58," and there is no credit of anything on this part of the account, and of necessity it must be credited on the other part. According to Mr. Cameron's and Mr. Lake's testimony and also from the face of the papers themselves, on this 28th day of November, 1876, T. H. Lake renders Cameron this statement showing that he, Lake, claims this balance nearly two months after the shipment of the eight bales and as a result of the claim Cameron procured the certificate above discussed. The other part of this statement is an account of J. A. Cameron with Lake & Marshall, running from September 11, 1876, to November 28th following and aggregating $118.44, for which we infer that T. H. Lake and W. T. Marshall formed their partnership sometime between June 28, 1876, and September 11th following, and that between those dates no supplies were furnished Cameron. This second part of the statement contains in addition to the account of Lake & Marshall, the item "Nov. 28th, am't. of account with T. H. Lake $632.58," making in all $751.02, and evidently the two accounts are blended only for the purpose of convenience. * * *

The sixth instruction is equally erroneous as the fifth, being erroneous as to the facts appearing on the face of the account. This statement is an itemized statement of J. A. Cameron's account, showing who the account is in favor of and consists of the

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very same items that make up his accounts with T. H. Lake and with Lake & Marshall, as shown in the other statement, dated November 28, 1876. * * *

The seventh instruction is erroneous in assuming as a fact what was never proven, that Cameron owed Lake two debts while the proof showed that he owed Lake a note, an open account, and also an open account to Lake & Marshall. Second. That several payments were made to Lake, while the fact is that there was only one payment, the eight bales, and that was made to Lake & Marshall. Third. "In this case it (the eight bales) is to be applied to the mortgage debt and upon payment the deed becomes void." This latter sentence takes the whole case out of the hands of the jury. It is a plain statement by the court that our trust deed is void. Surely this is erroneous. * * *

Brief of John W. Fewell:

* * * If the deed of trust of Lake was valid it was satisfied. The cotton shipped and sold ought to have been applied to the deed of trust part of the debt. As neither party seems to have made any application of it, the law applies it to the most onerous debt — the debt secured by the deed of trust, and when Cameron remitted the small balance remaining due, and ordered the same to be applied to the deed of trust debt, that operated as a satisfaction of the deed of trust.

The court will please note the account made out by Lake *ante litem motem*. After suit brought, the figures undergo some rather curious changes, and Lake, and Lake & Marshall get so entangled that there is danger of losing their identity. * * *

It will hardly be contended that Cameron had a right to do as he pleased with the tenant's crop. It was pledged to Chandler who advanced the supplies that raised the crop, and in reason, in justice, in equity, and at law the cotton was Chandler's, and the court did right and the judgment ought to stand.

OPINION.—COOPER, J., delivered the opinion of the court.

All the evidence in relation to satisfaction of the deed of trust, upon the existence of which the plaintiff's right to recover depends, tends to show payment of the entire debt and a consequent discharge of the incumbrance.

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Mr. and Mrs. Cameron owed Lake nothing at the time of the execution of note which was given as the representative of a debt to be thereafter incurred and which was to arise from advances to be made by Lake. Lake made no advances whatever, all were made by Lake & Marshall, but under an agreement between the members of the firm that the debt was to be owned by Lake alone. Something over $750 was advanced instead of the sum originally agreed on ($400), eight bales of cotton, a part of the mortgaged property, were shipped to Lake & Marshall, and sold by them, and the proceeds credited on the account. The account was the whole and only debt due or contracted. Disconnected from the account, the note had no validity because nothing would be due on it. The account, to the amount of the note, and the note itself represented one and the same debt. The appropriation of the proceeds of the cotton to the account operated *ipso facto* as payment of the first items thereof, and these items composed the debt represented by the note. Payment of these was payment of the note.

The appropriation made by the creditors was the same which the law have made in the absence of one of the parties. The appropriation of the payment having been made, and the mortgage debt to that extent extinguished, it was not within the power of Mr. Cameron, if he had desired and intended so to do, to direct it to be withdrawn and appropriated to the last items of the account without the approval of Mrs. Cameron, who was the owner of the mortgaged property and the real debtor. This is conclusive of the case without regard to any of the other questions presented.

The judgment is *affirmed.*

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MOBILE SAVINGS BANK *et al.* v. MURDOCK & PARCHMAN.

Assignment for Creditors — Void on its Face.

Where an assignment for creditors is attacked, in a bill in chancery, as being void in general terms and particular grounds are also assigned, and the assignment is made an exhibit to the bill and it is incurably void on its face, it will be declared void although the bill does not attack it on the particular ground on which it is vulnerable.[1]

Same — When Void.

A general assignment for the benefit of creditors, with preferences, which provided that the assignee shall close up the trust within nine months from the time the assignment is made, "or earlier as may be agreed upon by a majority of the preferred creditor" is void.

In April, 1881, Murdock & Parchman, merchants, doing business in Okolona, in Chickasaw county, were heavily in debt. They conveyed some property to individuals in payment of alleged debts, and on April 4, 1881, the firm made a general assignment of their property to D. P. Black, assignee, for the benefit of their

1

An exhibit being part of the bill no characterization of it by the pleader can alter its essential nature. Hence, when it is contradicted by an averment of the bill, the fact will be taken to be in comformity with the exhibit. Heuse *v.* Gumble, 78 Miss. 259, 29 So. 71; McNeill *v.* Lee, 79 Miss. 455, 30 So. 821.

In an assignment for creditors, the assignee takes the property impressed with all the limitations expressed in the deed. It is the measure of his power. Both he and the creditors must abide by its terms, and no court has the power to relieve him from compliance therewith, or to substitute its judgment for that of the assignor. The assignor is not only prohibited from providing for a benefit to himself, but he may not impress his will on the future management of the trust estate to the injury of creditors. Whatever provisions in the deed lead to the deprivation of the right to appropriate the property to their demands are unauthorized, and make the instrument void. Richardson *v.* Stapleton, 60 Miss. 97.

The assignment as written is the law for the administration of the insolvent's estate. Neither the assignee nor the courts may add to or substract therefrom, and as written it must be susceptible of complete execution without depriving creditors of their legal rights, or it may not stand against their attack. Richardson *v.* Stapleton, 60 Miss. 97; Marks *v.* Bradley, 69 Miss. 1, 10 So. 922; Selleck *v.* Pollock, 69 Miss. 870, 13 So. 248; Hiller *v.* Ellis, 72 Miss. 701, 18 So. 95.

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creditors. On the same day each of the partners made assignments to Black of their individual property for the benefit of the firm creditors and by the terms of these individual assignments the assignee was to hold this property upon the same trusts, terms, and conditions as he held the partnership property. The assignments provided for the payment of certain creditors in full before others were paid anything. The assignment, after directing the assignee to take possession, sell, collect, and convert into money with all due diligence the assets assigned, contains this provision: "Provided the said party of the second part (the assignee) shall close up this trust by the 1st of ———, 1881, or earlier, as may be agreed upon by a majority of the preferred creditors hereinafter named, and to that end may, at any time, by advertising the time and place, in any newspaper, published in the city of Okalona, for two consecutive issues, and by posting the same upon the door of the post-office and courthouse in said city and the door of the storehouse in which the goods are situated, for two weeks, sell at public outcry to the highest and best bidder for cash all and singular the property herein conveyed, including the notes, accounts, and choses in action uncollected and the real estate conveyed by this assignment and that conveyed by the individual assignments." Appellants, unpreferred creditors of Murdock & Parchman, filed the bill in this case in the Chancery Court of Chickasaw county against them, and those to whom conveyances had been made before the assignment was made, to vacate the assignment alleging it was made to hinder, delay, and defraud creditors in collection of their debts and was fraudulent setting up several reasons therefor.

The assignments were all made exhibits to the bill as were the several deeds made by Murdock & Parchman to other defendants. The defendants each answered denying that the assignments were fraudulent and void.

The cause was submitted for final decree upon the bill, answers, and exhibits, no proof having been taken. The court, after hearing the cause, dismissed complainants' bill and from that decree they appeal.

APPEALED from Chancery Court, Chickasaw county, second district, L. HAUGHTON, Chancellor.

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Reversed in part and affirmed in part.

Attorneys for appellant, Richard P. DeShon and W. T. Houston.

Attorneys for appellees, McIntosh & Williams, Houston & Reynolds.

Brief of Richard P. DeShon:

* * * All of said assignments were made at the same time, formed but *one* transaction, and were ostensibly made for the benefit of the creditors of the firm of Murdock & Parchman, as it is admitted by the answers of the appellees, Murdock, Parchman and Black. Said assignments to Black are with preferences, and direct that certain creditors shall be paid in full before any payment to the other creditors of the firm. * * *

It is insisted by appellants that these provisions require Black, the assignee, to *close up his trust* within the year of 1881, and must do so even earlier if directed by a *majority* of the preferred creditors, and that to do so, he shall sell at public outcry the notes, accounts, and choses in action then in his hands uncollected. From April 4, 1881, the date of the assignment, to the end of the year 1881, is not quite nine months — not enough time to enable the assignee to collect in any usual, ordinary, proper, or legal manner the debts, notes, and open accounts, or to foreclose and realize on the mortgages and other securities for such debts. It is a great wrong, hardship, and fraud on the unpreferred creditors to sell out these things "at public auction for cash," and so sacrifice them, before sufficient opportunity has been given to reduce them to money in the usual and proper way. The power conferred upon the majority of the preferred creditors to close up his trust and sell at auction the debts and accounts, even "*earlier,*" so that they may be paid in full sooner, at the sacrifice of the other creditors, is an undue and improper preference.

"Assignments with preferences, *per se,* should be judged as favorably by the principles of law as assignments which are *pro rata,*" 59 Miss. 80, applies only to such preferences as are proper; that is, preferences for priority of payment out of the assets in the hands of the assignee. * * *

This court has held in the late case of Richardson & May *v.* Stapleton & Bro., where no undue preference was given, that a

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provision in the deed of assignment, requiring the assignee to sell off the uncollected debts and choses in action in his hands, within eight months from the date of the assignment, tended to delay, hinder, and defraud the creditors, as that period was too short, within which to make that class of assets yield what they would do if collected and reduced to money in the usual and proper manner, and that the assignment was void as to the creditors.

In the case now before the court, not only is the assignee required to close up his trust and to sell at public outcry all the choses in action not collected in his hands, within nine months, but the *preferred creditors,* through a *majority,* can compel him to do so *earlier.* The power and dominion is given to the preferred creditors to squeeze at once a payment of their debts, and the unpreferred creditors are not even permitted to have a fair administration and collection of that part of the assets, out of which they might hope to receive a few crumbs.

That the intention of the parties was to fix the 1st day of December, 1881, as the date for the assignee to have entirely closed his whole trust under the assignment, is shown by the answer of R. A. Murdock and the answer of G. W. Parchman, as well as by the individual assignments of R. A. Murdock and G. W. Parchman, where that day is fixed. Murdock's counsel insisted in his answer, under the oath of Murdock, that all of said deeds of assignment were to be construed together as one transaction and instrument, and also insisted that in no way can the deed of the firm to Black be construed except that the assignee was to close up his trust entirely within the year 1881. With this construction we are content. * * *

All written instruments are to be construed by the court to effectuate the intentions of the parties as *expressed.* The deed of the firm reads, "on first of ———, 1881," and is dated April 4, 1881. It is absurd to say it means the first of 1881, for that is before the deed was made, and it is evident from the blank that only the month was left out. We do not ask the court to insert any month, but only to take the deed as it is, with the blank in it, and say whether it is not evident from the deed itself that the assignee was to close up his trust within the year 1881; at some time within that year. * * *

Could not the deed be reformed on the evidence in this record by the creditors so as to insert the month and require the assignee

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to close up his trust within the time? And would not the court, on that evidence, construe the deed as it now stands, so that such reformation would only be permitted so far as to insert a month within the year 1881? Is not that a construction of the deed, as it now stands, that it requires such action by the assignee within that year? And the deed is certain as to the year, and if the assignee takes up to the last day of the year, still there is not a reasonable time for the proper administration of the assets and choses in action in his hands. * * *

Nearly every written instrument requires construction by the court. Where a note was dated in May, 1837, and promised to pay a sum of money on "first of January, one thousand forty," the court by intendment held the note to be payable on first of January one thousand eight hundred and forty, although the words eight hundred have been omitted. Evans' Admr. *v.* Steel, 2 Ala. 114. * * *

It is apparent in their deeds that they did give to the preferred creditors an unfair and undue preference, a dominion and power over the assets and the assignee, that enabled them to force an immediate payment of their claims by the sacrifice of the other creditors.

We say that either of these provisions are contrary not only to the spirit but to the expressed and written letter of the law, and are fatal to said assignments.

It is contended by the counsel for appellees, that even if the assignments are void as to the real estate and choses in action, that as to the goods and chattels there was an actual delivery to the assignee; and that such *delivery* by *itself* worked a good and valid assignment, and vested in the assignee a perfect title to the goods and chattels, as against all the world. To sustain this position they cite the case of Baldwin *v.* Flash in 58 Miss. 593, and 59 Miss. 61. The case now presented and that case are in no wise similar. * * *

To pass title the delivery must be accompanied with a lawful intention to do so. A delivery of possession with an unlawful or fraudulent intent will not pass title as against his creditors, and the transaction is void as to *them,* no matter what it is between the *parties.* A man cannot turn over absolute possession of his chattels to another with intent to hinder, delay, and defraud his creditors and then be heard to say the delivery carried title as

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against his creditors. The intent may be implied from acts and circumstances, may be expressed in any way, by words spoken, by writing on paper in ink, or in chalk, or on the barn door; but the higher and more deliberate the form used, the higher is its value as evidence of that intention. * * *

In the present case there is a fraudulent intent to hinder and delay creditors pervading the entire transaction. The only expression of intent in the delivery to Black by Murdock and Parchman of their goods is to be found in their deeds of assignment, where is stated the whole intent and purpose of the transaction. Black was to hold the goods ostensibly for the benefit of the creditors of the firm as and in the same way he held the real estate and choses in action. The whole assignment and delivery was made at one time, was done for the same purpose and intent as to all the property assigned, and in the eye of the law was all done to hinder, delay, and defraud the unpreferred creditors by its terms, and to give an undue and unfair preference to the preferred creditors. And it is so admitted in the answers of Murdock and of Parchman. Burrill on Assignments, § 353.

Besides a mortgage of chattels, or deed of trust as security for a debt, as is the case of a general assignment for benefit of creditors, by the statute of Mississippi (Code 1880, §§ 1210, 1212), must be recorded, and consequently must be in writing, so as to be recorded and until recorded, is inoperative against creditors. The recorded deeds of assignment in this case embrace real estate, choses in action, and chattels, and are in law but one instrument and that instrument is void on its face as against appellants. * * *

Brief of W. T. Houston:

* * * The exhibits were made part of the bill and are to be considered as though set out in *haec verba,* and they are charged to have been fraudulent. Code 1880, § 1869.

That is, the facts are set out in full and fraud is charged.

The answers admit that assignments were to be closed out by sale, etc., within the year 1881, or in less than nine months from the date of the assignment, by at least four days, but it has been argued in the court below that under the pleadings we cannot avail ourselves of this because the bill avers that no time was fixed within which the assignee should pay over the proceeds of

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the property to creditors, which appellees construe to mean that no time was fixed for the assignee to sell the property.

We submit that this is not a legitimate construction of the allegation that fixing too early a date to sell avoids the assignment and we think fixing no time by which the assignee was to settle thereafter was another ground of objection. We think that by making the assignments part of the bill, we allege that it is void for requiring the sale to be made in an unreasonably short time and then charge further that it was also void because no time was fixed for him to pay over. The answers negative the idea that title to the personalty could have passed by the delivery by alleging that at the time of delivery the assignee was instructed to sell out the property during 1881, and he consented to this condition and accepted the possession under this condition, so that the contract evidenced by the delivery was itself as invalid as the written assignments. 60 Miss. 97; Jerre Seale v. Watkins & Gilliland, 4174, 4175, Opinion Book K, page 595. * * *

None of the answers deny the allegations of the bill as to the conveyances being made nor the kinship of the grantors and grantees therein, nor the insolvency of the grantors, but plead payment of a valuable consideration which is an affirmative matter which they must sustain by proof. Complaints by establishing insolvency of the grantors, relationship such as is shown, conveying all property away, make a case that devolves on the defendant the burden of showing a valuable consideration by testimony. Nor can this rule ever work injustice, because if there was a valuable consideration the evidence of it is always in the possession of the grantor and grantee, while it is difficult, even where no consideration was paid, for complainant to prove this negative. 1 Battle's Dig., N. C. Rep. 631, pl. 81; Busb. N. C. L. Rep. 105, 106, 108, 109; 2 J. J. Marshall's Rep. 215; 5 Ohio, 122; Lloyd *v.* Williams, 21 Pa. St. 331; 4 Jones Law (N. C.) 154; 34 Miss. 585.

The case in 58 Miss. 399, Salmon *v.* Smith, was perhaps against this view, but the point seems to have been assumed and conceded by counsel, and, therefore, perhaps was not critically considered by the court.

In that case, however, the insolvency of the grantor *at the date* of conveyance was not shown, and so the rule to invoke did not apply for to throw the onus of proving a consideration on the

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grantor, relationship and insolvency at the date of the conveyance must be shown. This we have done in the case at bar by the allegations of our bill and the admissions in the answers. The case in 58 Miss., does not refer to that in 34 Miss. 585.

The power to sell on a credit vitiated it. 2 N. Y. Rep. (Comstock), 371; 6 N. Y. Rep. (Selden), 518 *et seq.;* 34 Miss. 585, 586.

The commissions allowed assignee under it void, no proof of their reasonableness being adduced. 2 N. Y. (Comstock) 372.

Assignee's insolvency avoided assignment. Burrill on Assignments, p. 119, § 93.

If void in part, void in toto. Second Ed. Bump Fraud., Conn., p. 356. * * *

The reservation to a majority of the preferred creditors to fix a day for the sale of the property was making them the assignor's agents to that extent, and for that purpose, and might equally have been reserved to the assignors. The power given to all the creditors to fix the date of sale or to a majority of all might have been good, though I doubt the latter, as it would be permitting a debtor to subject the minority to the tyranny of numbers. * * *

This majority could have had the entire property sold within three weeks of date of the assignment and thereby given themselves an opportunity for a grand speculation at the expense of the others. The majority which was entrusted with this power was a majority of the preferred creditors only, who were themselves a minority of the whole. A part of the property assigned consisted of choses in action, a list of which is made an exhibit and shows that about fourteen of the claims exceeded the jurisdiction of a justice of the peace, and aggregated (exclusive of those which did not) the sum of about $4,000.

Brief of McIntosh & Williams:

The gravamen of the whole bill is, *fraud*, not fraud in law, but *fraud in fact*. The bill charges that the deed of assignment was made for the fraudulent purpose of defeating the creditors of the assignors, etc.; that each and every one of the conveyances made by both R. A. Murdock and G. W. Parchman, and the firm of Murdock & Parchman, was without consideration and made in fraud of the rights of complainants. The answers of each

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of the grantees, as well as those of the grantors and Black, the assignee, emphatically and unequivocally deny the fraud charged, and aver a valuable consideration, and show the *bona fides* of each and every transaction, not only of the deeds of assignment, but of every conveyance made either by the firm or either member of it. Without proof the cause was set down for hearing by the complainant below upon bill, answer, and exhibits. If the court had not dismissed the bill on the state of pleadings, it would have reversed the rulings of every court upon that state of pleadings since the beginning of chancery practice. * * *

Brief of Houston & Reynolds:

* * * This assignment is attacked because it requires the assignee to close the trust by the 1st of December, 1881, or during the year 1881, and the decision of this court in Richardson & May *v.* Stapleton, 60 Miss., is invoked to sustain it.

The bill does not assail the assignment on this ground, but on very different and almost opposite ground. It is assailed in the bill because no time is fixed in the assignment in which the assignee is to account to the creditors. The court will search in vain for any objection of this kind that was made in the brief of counsel for appellants to this assignment. If the court should hold that the deed is void on its face because of the provision which we have copied, appellants could not have any relief on that ground, because that is not the case as made by the bill. The bill presents a different case. It is useless for us to argue the legal proposition which is thus presented; it is too well settled for any difference about it. A complainant must recover on the case made by his bill, and if he is shown by the answer or by the testimony to be entitled to relief, but on grounds different from those made in the bill, it must be dismissed. This point is not presented in this court for the first time. It was made in the court below, and appellants, if they had requested, might have obtained leave to amend, and then presented a case which, if the deed is void for the reason indicated, might have entitled them to relief. If the bill had made the case that the deed was void because it empowered the assignee to sell the choses in action and to close the trust by the 1st of December, 1881, the defendants might have answered that this was best, and established that the claims were of such a character that they could

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not be recovered by suit, and the only disposition which could be profitably made of them was by sale. No opportunity was afforded to make any such defense or present any such proof.

The assignment was executed in April, 1881. The provision is that the assignee shall close up this trust by the first of , 1881, or earlier, as may be agreed upon by a majority of the creditors, and to this end, *may* sell the property, including the uncollected notes and accounts. The rule of construction is that such a construction shall be given to an instrument as will make it valid, rather than one which will avoid it. The courts lean to that construction which will give validity to the instrument. * * *

The provision to close the trust by the first of , 1881, does not mean that the trustees' power shall then cease. It means, not an ending of the powers of the trustee, but a closing out by sale of all the property, leaving it discretionary with him whether by this period he will sell the uncollected notes, etc. The assignee is required with as little delay as possible to collect and recover the notes. Effect must be given to this privision,— collect with as little delay as possible,— but if on the first of , 1881, he shall deem it best, he may sell at the time he is required to close out (sell) the balance of the property.

But the proviso that the trust shall be closed by the first of , 1881, is meaningless, taken in connection with the date of this assignment. An assignment executed in April, 1881, cannot be closed by the first of 1881. This is impossible, and impossible provisions will not avoid an instrument. * * *

The case of Richardson *v.* Stapleton, 60 Miss. 97, is not analogous to the one now before the court. There, the deed was declared void on its face because it provided that the assignee *shall* within nine months sell the uncollected claims. The sale within the time was imperative, and stress is laid upon this in the opinion of the court. Here a sale is discretionary, *may sell.* Even then if counsel in their interpretation of the assignment, that it must be closed by the 1st of December, 1881, or by the close of the year 1881, inasmuch as it leaves the sale of the uncollected claims to the discretion of the assignee, the assignment is not void.

The invalidity of the assignment because of the provisions indicated are the only points made by counsel.

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OPINION.— CAMPBELL, C. J., delivered the opinion of the court.

We think the assignment made by Murdock & Parchman is void, and while it is true that the bill does not attack the assignment on the particular ground on which we consider it vulnerable, it makes it a part of the bill, and alleges that it is void, and being incurably void as we regard it, it should be so held.

We recognize the rule that a party is not entitled to make one case by his bill, and a different one by his proof, but in this case the rule will not be violated by holding the assignment void because of the provision for a sale of choses in action, and the requirement that the trust be closed in 1881, which is our interpretation of the instrument.

Decree reversed so far as to declare the assignment void, and in all else it is affirmed.

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"If the jury believe from the evidence that defendant's train killed the horse of plaintiffs (on account of which this suit is brought) at or near the corporation line of the town of Kosciusko, and that the train which killed said horse was running at a speed of more than six miles an hour when it reached said corporation line, and that said horse would not have been killed but for the recklessness and negligence of the employees and agents of the Railroad Company, then the law is for plaintiffs, and the jury should find for plaintiffs a sum equal to the proved value of the horse so killed" is not reversible error.

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An indictment charges a defendant with unlawfully selling spirituous liquors in a quantity less than one gallon, there being a statutory provision for a penalty only for selling in quantities less than one "pint." *Held*, that judgment under said indictment cannot be enforced, and the judgment is arrested..... 261

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A creditor of an insolvent banking corporation, who is present at a meeting of its creditors when an assignment is resolved upon and expresses no dissent, cannot disaffirm an assignment made in pursuance of the agreement after a trustee has been appointed who took charge of the assets and sells same to innocent purchaser for value, and he will be enjoined from levying execution on land sold by said trustee and selling same. 8

Injunction should not be dissolved unless there is competent evidence to support the answer to bill.

The answer of the defendant to a bill to enjoin the sale of property is not evidence, and, even though it states a good defense, the injunction should not be dissolved unless there is competent evidence to support the answer. 400

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An administrator is not chargeable with interest on moneys collected for the estate, where it is shown that claims due to him as an individual will more than offset such interest. 514

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In a suit against a Railroad Company for damages for the alleged killing of a horse, where the testimony is sufficient to warrant a conclusion that the horse was killed by defendant's train; and there is no explanation of the manner of the killing, the presumption of negligence on the part of the employees of defendant prevails, and an instruction on behalf of plaintiff that: "If the jury believe from the evidence that defendant's train killed the horse of plaintiffs (on account of which this suit is brought) at or near the corporation line of the town of Kosciusko, and that the train which killed said horse was running at a speed of more than six miles an hour when it reached said corporation line, and that said horse would not have been killed but for the recklessness and negligence of the employees and agents of the Railroad Company, then the law is for plaintiffs, and the jury should find for plaintiffs a sum equal to the proved value of the horse so killed" is not reversible error.
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"If the jury believe from the evidence that defendant's train killed the horse of plaintiffs (on account of which this suit is brought) at or near the corporation line of the town of Kosciusko, and that the train which killed said horse was running at a speed of more than six miles an hour when it reached said corporation line, and that said horse would not have been killed but for the recklessness and negligence of the employees and agents of the Railroad Company, then the law is for plaintiffs, and the jury should find for plaintiffs a sum equal to the proved value of the horse so killed" is not reversible error.

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In such case where the bill failed to allege that the lands cultivated by defendant, or rented by him, exceeded his proportion of the common lands, the bill cannot be maintained as that of one tenant in common against another as to rents received after termination of partnership..... 248

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Same.

If, on the other hand, Mrs. E. was not the owner of the land, but had only an equitable right as against her husband, E., and was not bound for the payment of the notes given for it, she had the right to enforce vendor's lien, and such right was superior to appellee's mortgage. *Held*, that appellee could not say Mrs. E. was not the owner and thus make his mortgage good, and having sustained this position, then say that she was not always owner, and thus convert her intention to purchase the notes secured by vendor's lien into a payment for appellee..... 390

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An answer to a bill in chancery filed out of time should be stricken from the file on motion, but, on proper showing, leave to refile should be granted by the court upon reasonable terms.. 210

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In a bill filed by a member of a planting partnership against his partner praying for an accounting, the complainant cannot, as tenant in common of the lands, recover from his partner one-half or any other portion of the crops received by the firm, for the reason that the firm was authorized to receive them; and what portion of the proceeds belonged to complainant can only be determined upon a settlement of the partnership accounts. Complainant's rights as to these crops are determinable by his rights as partner, and not as tenants in common. In such case where the bill failed to allege that the lands cultivated by defendant, or rented by him, exceeded his proportion of the common lands, the bill cannot be maintained as that of one tenant in common against another as to rents received after termination of partnership 248

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A mortgage carrying an express grant of lands, with the provision "tenements, hereditaments, and appurtenances thereto pertaining," conveys the rents to the mortgagee as hereditaments.

In such case, the rents having passed to the mortgagee, they pass from him to a purchaser under foreclosure proceedings, and, as against the assignee of the rent notes who took them after the execution of the mortgage, such purchaser is entitled to them.. 231

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The proper judgment when a demurrer to a plea in abatement has been sustained is *respondent ouster*, but the court has power to permit the plea to be amended, and it should be exercised in a proper case, but the court must be informed of the nature of the proposed amendment, and why the plea was not made sufficient in the outset 385

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While lands belonged to the board of liquidating levee commissioners, under a valid tax sale for levee taxes, they were not subject to be again sold for levee taxes, and if so resold, no title is thereby conveyed 425

Where land was sold in 1867 to the State for taxes and again in 1870 to the liquidating levee board, and afterward under the decree of the Chancery Court of Hinds county, in Gibbs *v.* Green, purchased by one who procured a release of the State's title under the acts of March 4, 1884 (Laws, p. 182), and March 2, 1888 (Laws, p. 41), the validity of title so acquired is not affected by the question whether the title was in the levee board or State, since if either had title, he acquired it; and such land is thereafter subject to sale for unpaid taxes as his property 425

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Although a witness is very old, and his memory is much impaired, if he is enabled by means of a contemporaneous written account of the occurrence about which he testifies — made and preserved by himself — to give an intelligent account of it, he should be allowed to testify, although he admits that he knows nothing of the occurrence except as his memory is refreshed by the memorandum. And such testimony is admissible, although the memorandum is not introduced, if the witness holds it and refers to it when interrogated, and testifies that he knows that he correctly noted the facts thereon 318

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